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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,570

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY,
Appellant,

v.

EZRA TAFT BENSON, individually and as Secretary of Agriculture, et al., *Appellees.*

Appeal From Order of the United States District Court for the District of Columbia Denying Preliminary Injunction

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JOINT APPENDIX

Filed Aug. 31, 1956

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3632-56

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY,
Davenport, Iowa, *Plaintiff*,

v.

EZRA TAFT BENSON, individually and as Secretary of Agriculture,

DAVID A. HAMIL, individually and as Administrator of the Rural Electrification Administration, and

FRED H. STRONG, individually and as Deputy and as Acting Administrator of the Rural Electrification Administration,
Defendants.

Complaint for Declaratory Judgment and Injunctive Relief

AS AND FOR THE FIRST COUNT OF ITS COMPLAINT HEREIN, PLAINTIFF ALLEGES:

1. This is an action for a declaratory judgment and for a permanent injunction and other relief brought pursuant to the provisions of the Declaratory Judgment Act (Act of June 25, 1948, c. 646, 62 Stat. 964, as amended by the Act of May 24, 1949, c. 139, 63 Stat. 105, 28 U.S.C. §§ 2201-2) and the general equity powers of the United States District Court for the District of Columbia, and under the Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 237, 5 U.S.C. §§ 1001-9). There is now existing between the parties an actual controversy justiciable in character. With respect to that controversy the plaintiff needs a declaration of its rights by this Court and the relief herein prayed.

2. Plaintiff is a corporation organized and existing
2 under the laws of the State of Illinois and is duly

qualified to carry on its business in the State of Iowa and has its principal office in Davenport, Iowa.

3. The defendant Ezra Taft Benson is Secretary of Agriculture of the United States of America. The defendant David A. Hamil is Administrator of the Rural Electrification Administration, an agency in the Department of Agriculture. The defendant Fred H. Strong is Deputy Administrator of said Rural Electrification Administration, and at certain times hereinafter stated was Acting Administrator of said Rural Electrification Administration.

4. This action arises under the Rural Electrification Act of 1936, as amended, 7 U.S.C. 901-14 (hereinafter called the RE Act). The interest of plaintiff in the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

5. Plaintiff is an electric utility company which generates, purchases, transmits, distributes and sells electric energy over a broad service territory which covers a part of Illinois and 13 counties of Iowa, including specifically Webster County. In order to furnish electric energy to the customers within its service territory, plaintiff owns and maintains facilities, including thermal generating stations, transmission and distribution lines and appurtenances, having a total cost of more than $72,000,000.

6. As a part of its facilities plaintiff now owns and operates an electric system in Webster County, Iowa, which it purchased for approximately $784,000 under an
3 agreement with the Fort Dodge, Des Moines & Southern Railway Company (hereinafter called the Railway) dated March 15, 1956. An industrial customer of plaintiff in Webster County called Lehigh Sewer Pipe and Tile Company (hereinafter called Lehigh Pipe) receives, and for many years has received, central station service from that system. In addition, a municipal customer and a number of other industrial customers are, and

have been for many years, receiving central station service from that system.

7. Lehigh Pipe has in the past received from plaintiff or the Railway, and is presently receiving from plaintiff, by means of the aforesaid electric system, 25 cycle service. The town of Lehigh has in the past received from plaintiff or the Railway, and is presently receiving from plaintiff by means of the aforesaid electric system 60 cycle service.

8. Lehigh Pipe is building, and intends to complete, on a portion of the tract of land presently occupied by its plant a substantial addition to its present facilities for which 60 cycle service is desired. Early in 1955 the Railway offered to provide Lehigh Pipe with 60 cycle service for the addition to its plant facilities. The electric service requirements for the operation of Lehigh Pipe after completion of its additional facilities will be approximately 1,200 kilowatts and energy consumed will exceed 2,500,000 kilowatt hours per year.

9. At all times involved in this complaint plaintiff, or the Railway, was providing central station service to Lehigh Pipe and at all times involved in this complaint plaintiff, or the Railway, was willing and anxious to provide Lehigh Pipe with whatever additional service would be required because of the construction of the addition to the Lehigh Pipe plant.

4 10. Greene County Rural Electric Cooperative (hereinafter called Greene County Coop) is an incorporated association which acts as a distribution cooperative serving a number of customers in Webster County, Iowa, among other counties. Greene County Coop is a member of Central Iowa Power Cooperative (hereinafter called CIPCO). CIPCO is also an incorporated association which through its generating and transmission facilities supplies the electric energy requirements of Greene County Coop.

11. Some time after the Railway's offer to provide 60 cycle service for Lehigh Pipe's proposed additional plant facilities, Greene County Coop entered into negotiations with Lehigh Pipe for a contract to provide the electric power requirements for such additional facilities for a period of 20 years. Such negotiations took place at a time when Lehigh Pipe was receiving central station service from the Railway. As a prerequisite to furnishing the proffered service, and antecedent to the execution of a contract, authorization for a Rural Electrification Administration loan to construct the necessary transmission facilities was required.

12. In order for Greene County Coop to supply the electric power requirements of Lehigh Pipe, it was arranged that CIPCO build a transmission line of about 20 miles from a point west of Boone, Iowa, to a tap near the town of Lehigh. CIPCO, in order to finance the building of such transmission line to serve Lehigh Pipe, applied to the Rural Electrification Administration for a loan. A representative of Greene County Coop alleged in a proceeding before the Iowa State Commerce Commission that Lehigh Pipe was the only new customer to be served from the transmission line to be constructed.

13. Although Lehigh Pipe was already receiving central station service from the Railway and, therefore, was not a proper beneficiary under the RE Act to support the granting of an REA loan to supply its power requirements, a contract for a loan to CIPCO (designated Iowa 63EF Cedar Rapids), including approximately $120,000 for the above-described transmission line, was announced as having been signed on or about September 9, 1955, by defendant Strong as Acting Administrator.

14. By contract entered into under date of November 25, 1955, between Lehigh Pipe and Greene County Coop, it was agreed that Greene County Coop commencing in or about September of 1956 would for a 20-year period furnish the

electric power requirements of Lehigh Pipe's proposed addition.

15. CIPCO is proceeding to acquire all rights necessary to the construction of the transmission line in question and is proceeding as rapidly as possible to effect the construction of such transmission line, and unless defendants are enjoined as herein prayed the construction of such line soon will be commenced and completed. A representative of CIPCO stated in hearings before the Iowa State Commerce Commission that construction of the transmission line will require only about 30 days.

16. The effect of the illegal loan without which the transmission line could not be constructed will be to deprive plaintiff of the right to serve Lehigh Pipe, a customer previously and presently being served, and one who under the provisions of the RE Act has no standing as a beneficiary of an REA loan. Another consequence of the illegal loan will be to invest Greene County Coop with transmission facilities by which it may deprive plaintiff of other industrial and municipal customers presently receiving central station service from plaintiff. To that end Greene County Coop has already offered service from the proposed REA financed transmission line to the town of Lehigh and Kalo Brick & Tile Company, both customers presently receiving central station service from plaintiff.

17. Unless the relief herein prayed is granted, such illegal loan will result in irreparable injury and damage to the property and property rights of plaintiff, in that the proximate result thereof will be to deprive plaintiff of a profitable use of its recently purchased electric system and will cause loss of revenue to the plaintiff which will continue over a long period of time. The aggregate amount of injury and damage, although substantial, is not subject to exact determination.

18. The plaintiff is without any adequate remedy at law to prevent the injury and damage to its property and prop-

erty rights which it will sustain as the result of such illegal loan.

As and for the Second Count of Its Complaint Herein, Plaintiff Alleges:

19. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 16 hereof with the same force and effect as if herein set forth in full.

20. On information and belief of plaintiff, after the signing of the aforementioned loan contract, the eligibility of Lehigh Pipe as a beneficiary of a Rural Electrification Administration loan was reconsidered, and a decision was made in the Rural Electrification Administration that Lehigh Pipe was not an eligible loan beneficiary under the RE Act because it was already in receipt of central station service.

21. On information and belief of plaintiff, on or about May 24, 1956, after meetings between defendant Strong and other REA personnel and representatives of Greene County Coop or CIPCO or both and other persons to plaintiff unknown, defendant Strong reversed the decision that Lehigh Pipe was not an eligible beneficiary of a Rural
7 Electrification Administration loan and re-approved that portion of the loan contract which would enable CIPCO to construct a transmission line to serve Lehigh Pipe.

22. The above-described actions of defendant Strong and the representatives of Greene County Coop or CIPCO or both and other persons to plaintiff unknown constitute an unlawful and continuing conspiracy, as a result of which the qualification of Lehigh Pipe as an RE Act beneficiary which had been rejected as not meeting the legal requirements of the RE Act was approved and remains approved.

23. Defendant Hamil took office as Administrator of the Rural Electrification Administration on June 26, 1956. Thereafter plaintiff advised defendant Hamil of the illegal-

ity, hereinabove alleged, of that portion of the loan contract to finance construction of a transmission line to serve Lehigh Pipe, and requested him to review the matter and cancel such portion of the loan. Defendant Hamil has advised plaintiff that he has reviewed the matter, and he has refused to cancel such portion of the loan. Defendant Hamil has thereby adopted the action herein complained of and become a co-conspirator in the hereinabove alleged unlawful and continuing conspiracy.

24. Unless the relief herein prayed is granted, such unlawful conspiracy will result in irreparable injury and damage to the property and property rights of plaintiff in that the proximate result thereof will be to deprive plaintiff of a profitable use of its recently purchased electric system and will cause loss of revenue to plaintiff which will continue over a long period of time. The aggregate amount of such injury and damage, although substantial, is not subject to exact determination.

25. Plaintiff is without any adequate remedy at
8 law to prevent the carrying out of the unlawful conspiracy and the injury and damage to its property and property rights which it will sustain as the result of such unlawful conspiracy.

WHEREFORE, plaintiff prays:

1. That this Court decree that the loan contract the approval of which on or about September 9, 1955, was announced by the Acting Administrator of the Rural Electrification Administration in so far as such loan contract provides for the financing of the construction of a transmission line to serve Lehigh Sewer Pipe and Tile Company is without authority under the Rural Electrification Act and is, therefore, invalid and void;

2. That this Court decree that all action taken by the defendants in furtherance of said loan contract in so far as it so provides is invalid, unlawful and without effect;

3. That this Court, pending final hearing and determination of this action, enter an order granting a preliminary injunction restraining the defendants and each of them, their successor or successors in office, their assistants, employees, agents and other persons acting under their control and authority from taking any steps whatsoever to effectuate and carry out said loan contract in so far as it provides for the financing of the construction of a transmission line to serve Lehigh Sewer Pipe and Tile Company;

4. That this Court upon final hearing and determination of this action, enter a decree permanently enjoining the defendants and each of them, their successor or successors in office, their assistants, employees, agents and other persons acting under their control and authority from taking any steps whatsoever to effectuate and carry out said loan contract in so far as it provides for the financing of the
9 construction of a transmission line to serve Lehigh Sewer Pipe and Tile Company; and

5. That plaintiff have such other and further relief as to the Court may seem just and proper.

August 31, 1956

WILMER & BROUN

by HENRY T. RATHBUN
A Member of said Firm
616 Transportation Building
Washington 6, D. C.
Attorneys for Plaintiff

STATE OF IOWA
COUNTY OF SCOTT } ss.:

C. J. MATH, being first duly sworn, on oath deposes and says: that he is Vice President of Iowa-Illinois Gas and Electric Company; that he has read the foregoing and annexed Complaint; that he knows the contents thereof; and that the facts therein stated he verily believes to be true.

C. J. MATH

Subscribed and sworn to before me this 30th day of August, 1956.

R. C. SCHELLHORN
Notary Public

My commission expires July 4, 1957

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10 Filed Aug. 31, 1956

Motion for Preliminary Injunction

Now comes the plaintiff by its counsel, and upon the verified complaint filed herein, and the facts set forth therein, and upon the statement of points and authorities submitted herewith, respectfully applies to this Honorable Court, pursuant to Rule 65 of the Federal Rules of Civil Procedure for a preliminary injunction, enjoining and restraining the defendants herein and their successors in office, and officers, agents, assistants, servants, employees and attorneys and other persons acting under their control or authority, and those persons in active concert or participation with any of them from taking any steps whatsoever to effectuate and carry out the provisions of the loan contract signed on or about Spetember 9, 1955, in so far as any of such provisions relate to a loan by the Rural Electrification Administration to Central Iowa Power Cooperative for the pur-
11 pose of financing the construction of a transmission line which would furnish electric power to Greene County Rural Electric Cooperative and through Greene

County Rural Electric Cooperative to Lehigh Sewer Pipe and Tile Company.

August 31, 1956

WILMER & BROUN

by HENRY T. RATHBUN
A Member of said Firm
616 Transportation Building
Washington 6, D. C.
Attorneys for Plaintiff

---

29 Filed Sep. 18, 1956

Plaintiff's Exhibit No. 1

Affidavit

STATE OF IOWA
SCOTT COUNTY } ss.

I, Edward J. Hartman, being duly sworn on oath, depose and say:

1. I am an attorney at law employed by Iowa-Illinois Gas and Electric Company.

2. On September 14, 1956, I attended a hearing before the Iowa State Commerce Commission at Des Moines, Iowa, in connection with the application of Iowa-Illinois Gas and Electric Company for a franchise (Dockets Nos. E-11725 and E-11726).

3. At that hearing Joe Bryant, vice president and general manager of Lehigh Sewer Pipe & Tile Company, testified that because of the effects of the recent steel strike the proposed new plant facilities now under construction would not be completed until approximately February 1, 1957.

30 4. Upon information and belief of deponent, the statement by Mr. Bryant referred to above is true.

EDWARD J. HARTMAN
Edward J. Hartman

Subscribed and sworn to before me, a notary public in and for Scott County, Iowa, this 17th day of September 1956.

W. B. WATERMAN
Notary Public

---

31 Filed Sep. 18, 1956

Plaintiff's Exhibit No. 2

Affidavit

STATE OF IOWA }
SCOTT COUNTY } ss.

I, C. J. Math, being first duly sworn on oath, depose and state:

1. I am vice president, districts and sales, of Iowa-Illinois Gas and Electric Company in charge of operations in the Fort Dodge District comprising generally operations of the Company in Webster County.

2. All franchises from the Iowa State Commerce Commission which will enable Iowa-Illinois to serve the 60-cycle requirements of the additional plant facilities of Lehigh Sewer Pipe & Tile Company in Webster County, Iowa, have been received, except one which has been submitted and is now awaiting ruling.

32 3. Except for seven miles of transmission line which has not yet been constructed, the facilities to serve the 60-cycle requirements of Lehigh Pipe's additional facilities are substantially completed.

4. The construction of said seven miles of transmission line can be completed under ordinary working conditions in a period of 60 days.

C. J. MATH
C. J. Math

Subscribed and sworn to before me, a notary public in and for Scott County, Iowa, this 17th day of September 1956.

W. B. WATERMAN
Notary Public

---

12 Filed Sep. 11, 1956

Opposition to Motion for Preliminary Injunction

Come now the defendants by their attorney, the United States Attorney, and respectfully opposes the plaintiff's motion for preliminary injunction. The grounds therefor are set forth in the attached Memorandum of Points and Authorities. There are attached hereto and prayed to be made a part hereof certain affidavits and exhibits numbered 1 through 5.

OLIVER GASCH
Oliver Gasch
United States Attorney

EDWARD P. TROXELL.
Edward P. Troxell, *Principal Assistant United States Attorney*

FRANK H. STRICKLER
Frank H. Strickler
Assistant United States Attorney

E. RILEY CASEY
E. Riley Casey
Assistant United States Attorney

Of Counsel:

WILLIAM ARNOLD
William Arnold, *Attorney*
Department of Justice

E. F. MYNATT
E. F. Mynatt, *Ass't. General Counsel, Dept. of Agriculture*

13 Filed Sep. 11, 1956

Exhibit 1

Affidavit

DISTRICT OF COLUMBIA) ss

FRED H. STROHE, being first duly sworn, deposes and says as follows:

1. He is Deputy Administrator of the Rural Electrification Administration (REA), an agency of the Department of Agriculture of the United States of America, and he was Acting Administrator, REA, on or about September 9, 1955, and in that capacity and on that date he approved for the United States of America, a loan (designated Iowa 83EF Cedar Rapids) in the amount of $11,173,000 to Central Iowa Power Cooperative ("CIPCO"), Cedar Rapids, Iowa.

2. This loan was made pursuant to the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 et seq.) and in accordance with the administrative findings required by 7 U.S.C. 904, to finance the construction by CIPCO of certain electric generating and transmission facilities, including one 44,000 KW generating unit, 138 miles of 115 KV transmission line, 176.5 miles of 34.5 KV transmission line, and related substation and switching facilities, for the purpose of furnishing electric energy to CIPCO's eight REA-financed member cooperatives.

14 3. Included in the 176.5 miles of 34.5 KV transmission line were 20 miles designated the "Lehigh Tap", to enable CIPCO to furnish one of its member cooperatives, Greene County Rural Electric Cooperative ("Greene County"), with a supply of power for a large power load in the vicinity of Lehigh, Iowa.

4. In October 1955, Greene County, in accordance with its REA loan agreements, submitted for REA approval a

contract for electric service, dated October 4, 1955, between Greene County and Lehigh Sewer Pipe and Tile Company ("Lehigh").

5. On or about November 15, 1955, this contract was returned without approval to Greene County, because it appeared that Lehigh was then receiving 25 cycle electric service from Fort Dodge, Des Moines and Southern Railway.

6. In April 1956, Greene County and CIPCO renewed their request for REA approval of a contract for electric service between Greene County and Lehigh. Facts were presented by Greene County and CIPCO showing that the contract contemplated service not to the existing plant of Lehigh, nor to an extension of or addition to the existing plant, but to a completely new, separate and independent plant. After investigation and consideration by REA of these and all relevant facts and circumstances, an administrative determination was made, pursuant to 7 U.S.C. 904, that Lehigh, at its new plant, was not receiving central station electric service. The Greene County-Lehigh contract, dated November 25, 1955, was approved on June 19, 1956.

7. Each and every action taken by me and by REA in respect of the loan to CIPCO and approval of the Greene County-Lehigh contract was in accordance with the requirements of the Rural Electrification Act of 1936, of the administrative policies and procedures of REA, and of the loan agreements between the United States and the borrowers concerned.

8. In approving the CIPCO loan, revenue from the potential consumers, provided for in the loan, was taken into account in making the feasibility studies and findings required by 7 U.S.C. 904. Delay in serving or prevention of service to a consumer provided for in the loan will adversely affect the ability of CIPCO to repay its loan,

and will therefore injure and damage the Government's security for the loan.

FRED H. STRONG
Fred H. Strong

Subscribed in my presence and sworn to before me this 7th day of September 1956.

ELVA WINTERS
Notary Public

My commission expires Dec. 14, 1956

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16 Filed Sep. 11, 1956

Exhibit H

Affidavit

17 DISTRICT OF COLUMBIA) ss

I, CLARKE E. BENNETT, being first duly sworn, on oath depose and state:

That I am a Registered Professional Engineer, same being #2780 issued by the Iowa State Board of Engineering Examiners; that I am the Transmission Engineer of Brown Engineering Company, consulting engineers, Des Moines, Iowa; that Brown Engineering Company is the consulting engineer retained by the Central Iowa Power Cooperative, Cedar Rapids, Iowa (hereinafter referred to as "CIPCO"), to design and supervise the construction of an expansion program, including a 100% increase in generating capacity, and appropriate additional transmission facilities, including the 34,500 volt transmission line commonly referred to as the "Lehigh Tap"; that I have read, have access to, and am generally familiar with the various contracts, documents and instruments between CIPCO and its member cooperatives, including the Greene County Rural Electric Cooperative; that I have personal

knowledge of the general design, construction and condition of the electric facilities formerly owned by the Fort Dodge, Des Moines & Southern Railway Company in Webster County, Iowa, and particularly in the area of the Town of Lehigh, presently claimed to be owned and operated by the Iowa-Illinois Gas & Electric Company.

That the wholesale power contract between CIPCO and its member cooperatives, including the Greene County Rural Electric Cooperative, contains appropriate exchange of obligations and agreements that the Greene County Co-

operative shall purchase all of its electrical require-

18 ments at wholesale from CIPCO, and that CIPCO shall provide at load centers as determined by the System Studies of the Greene County Cooperative, such quantities and voltages of electrical current as may be required by said Studies to provide adequate and dependable electrical service at the substations of the Greene County Cooperative; that the System Studies of the Greene County Cooperative show the necessity of a substation near the Town of Lehigh, Iowa; that the minimum voltage of transmission line in the CIPCO system is 34,500 volts; that under its obligation to provide the electric power requirements of the Greene County Cooperative, it is necessary that CIPCO construct a 34,500 volt transmission line to a point near Lehigh, Iowa, at which point the Greene County Cooperative may attach a substation owned by the Greene County Cooperative for the purpose of transforming 34,500 volt electrical current to 7,200/12,500 volts for the purpose of distribution to the Greene County consumers.

That CIPCO did apply to the Administrator of the Rural Electrification Administration for the authorization of a loan to finance the construction of the entire expansion program, including additional generation and transmission facilities, and including particularly the construction of a 34,500 volt transmission line to the vicinity of Lehigh, Iowa; that said loan was granted and authorized by the

Acting Administrator of the Rural Electrification Administration under date of September 9, 1955; that in reliance upon said loan, CIPCO did advertise for proposals from contractors for the construction of certain transmission lines, including the Lehigh Tap; that the proposal of the Hoak Construction Company was accepted, and a contract executed between CIPCO and said Hoak Construction
19 Company; that said Hoak Construction Company has begun to perform said contract, and has completed a substantial portion of said contract and is presently actively engaged in the consummation and completion of said contract.

That proceeding under the Laws of the State of Iowa, CIPCO did apply to the Iowa State Commerce Commission for a franchise authorizing the construction of said transmission line over, along and upon certain prescribed right-of-way, same being Dockets E-11725 and E-11726 of the records of the Iowa State Commerce Commission; that objections to said franchise were filed by the Iowa-Illinois Gas & Electric Company before said Commission to the granting of said franchise; that hearings were held on July 10, 1956, upon said Application and said Objections, both of which were vigorously contended before said Commission; that written briefs were filed in said matter, and that on August 28, 1956, the said Iowa State Commerce Commission did order the franchise issued as applied for by CIPCO.

That relying upon the documentation of said loan and relying upon the approval of the Plans and Specifications for said Lehigh Tap by the Administrator of the Rural Electrification Administration, CIPCO did enter into certain engineering service contracts and the construction contract with Hoak Construction Company, and has acted upon said contracts including the preparation of plans and drawings, the obtaining of right-of-way, and construction of portions of said line; that the Complaint filed in the case of Iowa-Illinois Gas & Electric Company v. Ezra

Taft Benson, et al, shows upon its face that Complainant had knowledge of said loan for more than nine months before the filing of said Complaint, and that said Iowa-Illinois Gas & Electric Company had knowledge of the reliance of said CIPCO upon said loan and incurring of obligations thereunder.

That the present facilities alleged to be owned and operated by the Iowa-Illinois Gas & Electric Company in the area of Lehigh, Iowa, are incapable of supplying the quantity, quality or reliability of 60 cycle electric service required by the totally new manufacturing plant being constructed by the Lehigh Sewer Pipe & Tile Company without the major reconstruction of the presently old and decrepit 2,300 and 7,200 volt single phase farm distribution lines owned and operated by said Iowa-Illinois Gas & Electric Company in the vicinity of Lehigh, Iowa; that said Iowa-Illinois Gas & Electric Company is presently rebuilding said distribution line for 13,800 volts three-phase operation, receiving an appropriate franchise for approximately 9 miles after hearing on August 14, 1956, and after having been stopped in construction of said line by the Iowa State Commerce Commission for having failed to obtain appropriate franchise rights; that said Iowa-Illinois Gas & Electric Company has now on file with the Iowa State Commerce Commission an application for a franchise for approximately 7.5 miles which, if granted, would authorize the construction of facilities which could furnish sufficient capacity to serve said new manufacturing plant, but that said franchise application is scheduled for hearing before said Iowa State Commerce Commission on September 11, 1956.

FURTHER DEPONENT SAYETH NOT.

CLARKE E. BENNETT
Clarke E. Bennett

Subscribed in my presence and sworn to before me by the said Clarke E. Bennett, this 7th day of September, A.D., 1956.

ELVA WINTERS
Notary Public.

(Notarial Seal.)
My Commission Expires Dec. 14, 1956.

Exhibit III

21 Filed Sept. 11, 1956

Affidavit

I, Donald R. Norris, being first duly sworn, on oath depose and state:

1. That I am a Registered Professional Engineer, same being #2846, issued by the Iowa State Board of Engineering Examiners; that I am Electrical Engineer for the Greene County Rural Electric Cooperative, Jefferson, Iowa; that I am familiar with the various instruments and contracts between the Cooperative and the Central Iowa Power Cooperative (hereinafter referred to as "CIPCO"), and have physical access to copies thereof; that I have examined and have physical access to the contract between the Cooperative and Lehigh Sewer Pipe & Tile Company; that as the Electrical Engineer of the Cooperative, I made an engineering system study of the electrical characteristics and requirements of the consumers of the Cooperative to determine the manner of providing the most reliable and adequate electrical service to the said consumers of the Cooperative, and revise said system study from time to time as the characteristics of electrical requirements of said consumers change.

2. That under the contractual undertakings between the Cooperative and CIPCO, the Cooperative is obligated to

purchase all of its electrical requirements from CIPCO, and CIPCO is obligated to make available to the Cooperative at distribution load centers all the electrical
22 requirements of the Cooperative; that the Cooperative entered into a contract with the Lehigh Sewer Pipe & Tile Company for the furnishing of electrical service to a totally new manufacturing plant to be constructed on real estate owned for many years by said Company; that an analysis of the electrical requirements of said Tile Company in addition to the existing requirements of consumers in the general area revealed the engineering necessity for the location of a new substation in the general area of Lehigh, Iowa; that the Cooperative requested CIPCO to construct a new transmission line to said newly determined loan center, and that CIPCO undertook the necessary proceedings to acquire authorization to build said transmission line; that in reliance upon said authorization to CIPCO, including a loan from the United States Government acting through the Rural Electrification Administration, the approval of an Engineering Service Contract by REA authorizing the engineers for CIPCO to design and locate said transmission line, the award of a contract to a construction contractor and approved by REA for the actual construction of said transmission line, and the acquisition of right-of-way and application for franchise from the Iowa State Commerce Commission by CIPCO, the Cooperative contracted for and did purchase the necessary substation structures and equipment for a sum in excess of $40,000 to receive electric service at the proposed new substation and provide capacity to fulfill its contract with the Sewer Pipe Company and to provide the improved service to existing and potential consumers; that a substation of comparable cost would be necessary to meet the electrical requirements of the existing and acquired consumers in approximately five years, regardless of the requirements of the Tile Company, and that the only difference would be the physical location of said

substation which would have to be determined from a new system study of the service area.

3. That in addition to the requirements of the Sewer Pipe Company, the Cooperative will connect approximately 138 existing consumers to said new substation; that the Cooperative has contracted to serve approxi-
23 mately 123 additional consumers, approximately 50 of which will be attached to and receive service directly from said new substation; that in addition to the approximately 188 farm consumers which will be immediately served from said substation, electrical circuits will be so located and constructed as to furnish loop service to an additional 119 existing consumers in cases of outages at a substation presently owned and operated by the Cooperative and referred to as the "Ridgeport Substation"; that such construction will substantially improve the reliability and adequacy of electrical service to said total of approximately 307 farm consumers of the Cooperative, regardless of the attachment of the electrical load of the Sewer Pipe Company.

4. That for more than three and one-half years, the Cooperative has been furnishing 60 cycle electrical service from a 7,200 volt, single phase distribution line to a residence owned by the Sewer Pipe Company and located upon the tract of real estate owned by said Company for many years and upon which said new manufacturing plant is being constructed, which said residence is occupied by the head kiln fireman for said Sewer Pipe Company.

DONALD R. NORRIS
Donald R. Norris

Subscribed in my presence and sworn to before me this 7th day of September, 1956.

ELVA WINTERS
Notary Public

My Commission Expires Dec. 14, 1956.

Exhibit IV

Filed Sept. 11, 1956

Affidavit

STATE OF IOWA
WEBSTER COUNTY } ss:

I, Joe A. Bryant, being first duly sworn, on oath depose and state:

That I am Vice-President and General Manager of Lehigh Sewer Pipe & Tile Company, with general offices at Fort Dodge, Iowa, and a manufacturing plant at Lehigh, Iowa; that I am actively engaged in the management of the business and affairs of said Company, and participate in the consideration of general policies adopted by the Board of Directors of said Company.

That the present plant owned and operated by said Company at Lehigh, Iowa, was in 1955 served with 25 cycle electrical service by the Fort Dodge, Des Moines & Southern Railway Company, and is now served with said 25 cycle electrical service by the Iowa-Illinois Gas & Electric Company; that disregarding the contract provisions for such 25 cycle electrical service, the Iowa-Illinois Gas & Electric Company has now notified the Company that it will discontinue the availability of 25 cycle electrical service as of September 30, 1957.

That in 1955, said Company considered the establishment of a totally new manufacturing plant for the production of sewer pipe and tile; that two important requirements for such a plant are an adequate supply of the peculiar quality of clay required for such tile and an adequate supply of electricity at a price which will permit production within costs competitive in the industry; that modern machinery requires the availability of 60 cycle electrical service; that the area of Lehigh has an adequate supply of appropriate clay, and was one

of four sites considered for the location of the new plant; that the local suppliers of electrical service at 60 cycles were the Town of Lehigh, and the Greene County Rural Electric Cooperative; that in response to a request, the Town of Lehigh advised the Company that it could not furnish electrical service at 60 cycles in the quantities and with the reliability of service required for the operation of such a manufacturing plant, requiring approximately one-fourth of the connected plant load in service around the clock; that the Fort Dodge, Des Moines & Southern Railway Company proposed the furnishing of such electrical service, but because of the necessity of substantial additional investment in facilities, quoted a rate for such electrical service as would have prevented the Company from producing its products at a price which would be competitive in this highly competitive industry; that negotiations were undertaken with the Greene County Rural Electric Cooperative, and a contract was concluded and executed; that upon the determination of an available electrical supply of sufficient reliability, quantity and price, the Company determined to construct said totally new manufacturing plant on real estate already owned by said Company at Lehigh.

That modern machinery for the manufacture of the products of the Company requires the use of electricity at 60 cycles, rather than the now outdated and outmoded use of electricity at 25 cycles; that while machinery requiring 25 cycles service might be obtained, it would only be by special order and special manufacture, and would present problems of first cost, maintenance and spare parts; that intervening time has resulted in the Company being advised that 25 cycle service would not be available after September 30, 1957, confirming the decision of the Company to build for 60 cycle electric service in the new plant; that the Iowa-Illinois Gas & Electric Company did not have 60 cycle electric service available in the vicinity of Lehigh in sufficient quantities and of sufficient reliability at the time of

these considerations to fulfill the requirements of said new manufacturing plant, and does not have such facilities at the time of this affidavit.

That the new manufacturing plant, which will be served under the contract between the Company and the Greene County Rural Electric Cooperative, is a totally new, separate and independent facility of the Company; that
26 its operation will be completely independent and without any interchange of products work, or material with existing facilities of the Company; and that this new plant to be served by Greene County Rural Electric Cooperative will be as totally separate and apart from the existing facilities of the Company in its operation as though it were constructed many miles distant from the presently existing and operating plant.

That the residence of the head kiln fireman for the company owned and located on the same general tract of land as the existing and operating plant, and as the newly constructed plant, has been satisfactorily served with electricity by the Greene County Rural Electric Cooperative for approximately four years, and it is expected that it will continue to be so served.

That this Company has a binding contract with the Greene County Rural Electric Cooperative for the furnishing of electrical service; that this Company expects to comply with its contractual obligations under the terms of said contract; and that this Company expects the Greene County Rural Electric Cooperative to comply with its contractual obligations thereunder.

FURTHER DEPONENT SAYETH NOT.

JOE A. BRYANT
Joe A. Bryant

Subscribed in my presence and sworn to before me by the said Joe A. Bryant, this 8th day of September, A.D. 1956.

Esther Piotter
Notary Public in and for Webster County, Iowa.

(Notarial Seal.)

My Commission Expires July 4, 1957.

---

27 **Exhibit V**

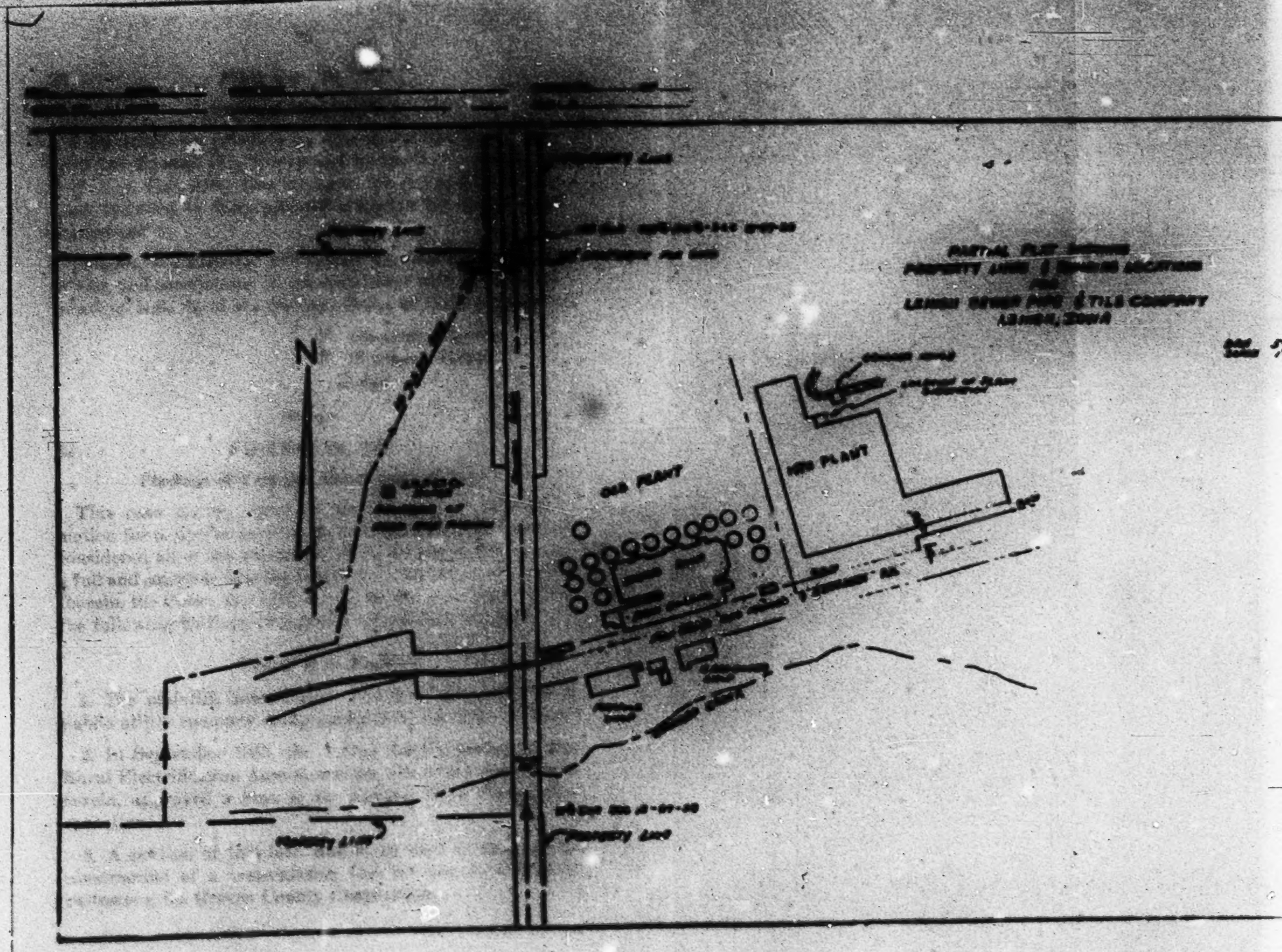
Certification to be Appended to Map of the Buildings of the Lehigh Sewer Pipe & Tile Company

Filed Sep. 11, 1956

This Plat is hereby certified to be a proper representation of the location of existing buildings and construction of present manufacturing plant, and the location of an entirely new manufacturing plant being constructed, all of the Lehigh Sewer Pipe & Tile Company, Lehigh, Iowa. The Company owns approximately 227.47 acres in the entire tract, and this drawing shows only that portion upon which are located the manufacturing plant and immediately adjacent area.

Dated September 8, A.D., 1956.

Joe A. Bryant
Joe A. Bryant
Vice-President and General Manager, Lehigh Sewer Pipe & Tile Company.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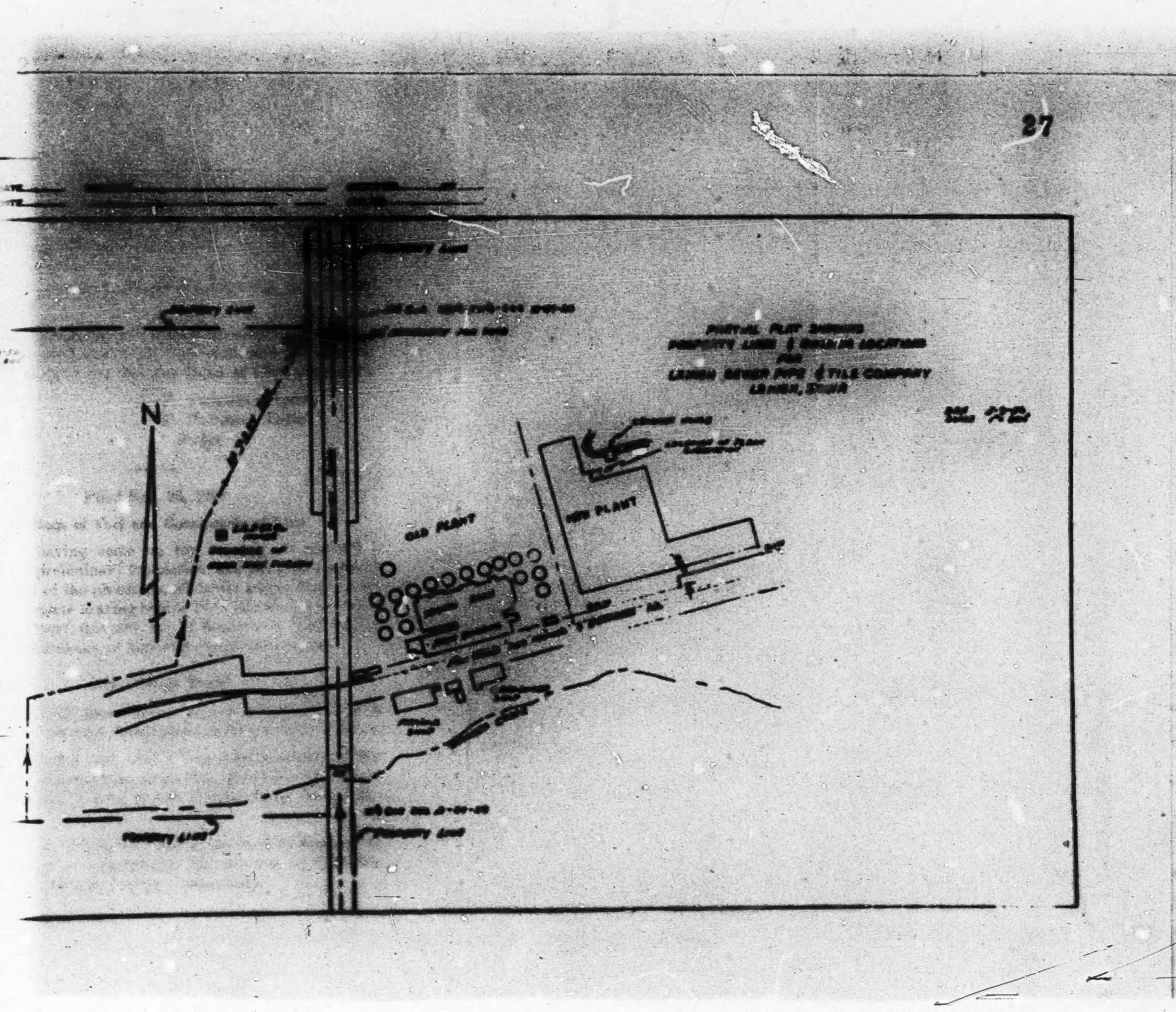
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(P. 28 BLANK)

33 Filed Sep. 24, 1956

Informal Memorandum

I am unable in principle to distinguish the case at bar from the Kansas City Power and Light Co. v. McKay, 96 U.S. App. D.C. 273. Relying upon the ruling in that case I am impelled to deny plaintiff's motion for preliminary injunction.

Counsel for defendant will submit for settlement findings of fact and conclusions of law consistent with the requirements of Rule 52 of the Federal Rules of Civil procedure.

F. DICKINSON LETTS
F. Dickinson Letts
Judge

---

34 Filed Sep. 26, 1956

Findings of Fact and Conclusions of Law

This case having come on for hearing on plaintiff's motion for a preliminary injunction, and the Court having considered all of the pleadings, affidavits and evidence, and a full and complete hearing having been afforded the parties thereto, the Court, this 26th day of September, 1956, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The plaintiff, Iowa-Illinois Gas & Electric Co., is a public utility company doing business in the state of Iowa.

2. In September 1955, the Acting Administrator of the Rural Electrification Administration, one of the defendants herein, approved a loan to the Central Iowa Power Co-operative.

3. A portion of this loan was to be used to finance the construction of a transmission line for one of CIPCO's customers, the Greene County Cooperative.

4. The Greene County Cooperative has entered into a contract with the Lehigh Sewer Pipe & Tile Co., of Lehigh, Iowa, to supply them with 60-cycle electrical power, which will be supplied from said transmission line.

5. The Lehigh Pipe Co. is presently a customer of the plaintiff, Iowa-Illinois Gas & Electric Co.

Conclusions of Law

1. Plaintiff has no standing to sue. *Kansas City Power & Light Co.* v. *McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924 (1955), *cert. denied* 350 U.S. 884.

35 2. The motion for a preliminary injunction will be denied.

F. Dickinson Letts
Judge

---

36 Filed Sep. 26, 1956

Order

This cause having come on for hearing on plaintiff's motion for a preliminary injunction, and in accordance with the findings of fact and conclusions of law entered herein, it is by the Court this 26th day of September, 1956,

Ordered, That plaintiff's motion for a preliminary injunction be and it is hereby denied.

F. Dickinson Letts
Judge

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No. 144

Office - Supreme Court, U.S.
FILED
MAY 28 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, *Petitioner,*

v.

EZRA TAFT BENSON, individually and as Secretary of Agriculture, DAVID A. HAMIL, individually and as Administrator of the Rural Electrification Administration, and FRED H. STRONG, individually and as Deputy and as Acting Administrator of the Rural Electrification Administration, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit

---

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, *Petitioner,*

v.

EZRA TAFT BENSON, individually and as Secretary of Agriculture, DAVID A. HAMIL, individually and as Administrator of the Rural Electrification Administration, and FRED H. STRONG, individually and as Deputy and as Acting Administrator of the Rural Electrification Administration, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit

---

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on February 28, 1957, as amended by order of said Court dated March 12, 1957.

OPINIONS BELOW

The informal memorandum of the District Court denying petitioner's motion for preliminary injunction is unreported and is printed in the record. (R. 29)* The opinion of the Court of Appeals as amended (R. 31, 32) is not yet officially reported and is printed in Appendix A hereto, *infra*, p. 1a.

JURISDICTION

The judgment of the Court of Appeals (R. 33, App. B, *infra*, p. 2a) was entered on February 28, 1957, and an order amending such judgment (R. 34, App. B, *infra*, p. 3a) was entered on March 12, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

When the Administrative Procedure Act grants judicial review to any person adversely affected or aggrieved by agency action within the meaning of any relevant statute, can petitioner, an electric utility company, be denied standing to sue for declaratory and injunctive relief against a loan, made in violation of the Rural Electrification Act, which adversely affects and aggrieves petitioner by excluding it from serving the additional electrical energy requirements of an existing customer?**

---

* Nine additional copies of the portions of the record, which were printed in a Joint Appendix for the use of the court below and are included in the record certified to this Court, are filed herewith.

** Although petitioner also claimed standing below on additional grounds, this petition is limited to its claim under Section 10(a) of the Administrative Procedure Act. This claim is in turn limited to the "adversely affected or aggrieved" provision of that Section. No question is presented under the "legal wrong" provision.

STATUTES INVOLVED

The statutes involved are: § 4 of the Rural Electrification Act of 1936, as amended (Act of May 20, 1936, c. 432, 49 Stat. 1365; Act of Sept. 21, 1944, c. 412, 58 Stat. 739-40; and Act of Oct. 28, 1949, c. 776, 63 Stat. 948, U.S.C. Title 7, § 904), which reads in relevant part as follows:

> "The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, * * *."

and § 10(a) of the Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 243-4; U.S.C. Title 5, § 1009(a)), which reads in relevant part as follows:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

STATEMENT OF THE CASE

Petitioner, an electric utility company, brought this action for declaratory and injunctive relief against a Rural Electrification Administration loan of approximately $120,000 on the ground that such loan violates the central station service limitation of the Rural Electrification Act and irreparably damages petitioner by excluding it from serving the additional requirements of an existing customer now receiving central station service from petitioner. Under the central station service limitation, loans are authorized "for the furnishing of electric energy to persons in rural areas who are *not* receiving central station service". The term "central station service" is not defined in the Act, but it is a term generally used in the electric industry to mean electricity received from a central generating station as distinguished from an individual generating unit, such as a Delco plant. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331 and Part II of the District of Columbia Code, §§ 11-305, 11-306 (R. 2, 3).

With the complaint, petitioner filed a motion for preliminary injunction (R. 10). The District Court denied that motion (R. 29, 30) on the sole ground that petitioner did not have standing to sue, citing *Kansas City Power & Light Company* v. *McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924, cert. den. 350 U.S. 884. The Court of Appeals affirmed and directed that the complaint be dismissed for lack of standing (Appendix A, *infra*, p. 1a). There has not been any trial or determination of the merits. In this preliminary posture of the case, where the complaint has been ordered dismissed as a matter of law for lack of standing before trial and without determination of the alle-

gations made, petitioner is entitled to have the question of its standing to sue determined on the basis of the well pleaded allegations of its complaint. The pertinent allegations appear in Count One of the complaint (R. 2-7) and may be summarized as follows:

Petitioner (or its predecessor) has for years been furnishing central station service to an industrial customer, Lehigh Sewer Pipe and Tile Company, and is willing and has offered to provide service to meet the requirements of an addition which is being constructed to the facilities of Lehigh. (R. 3-4)

Since Lehigh was receiving central station service from petitioner, there was no authority under the Rural Electrification Act to make a loan to supply the power requirements of the addition to the facilities of Lehigh. Nevertheless, in September, 1955, the Rural Electrification Administration approved a loan of about $120,000 to Central Iowa Power Cooperative* which had as its sole purpose the financing of construction of an electric transmission line to enable Greene County Rural Electric Cooperative* to serve such requirements. (R. 4-5)

After said loan was approved, Greene County Rural Electric Cooperative entered into a twenty year contract with Lehigh to furnish the power requirements of the addition to the latter's facilities. As a result of the illegal loan, petitioner is being irreparably dam-

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* Central Iowa Power Cooperative is a generating and transmission cooperative which furnishes electric energy to Green County Rural Electric Cooperative, a distribution cooperative.

aged in that it is excluded from furnishing the additional power requirements of Lehigh and may be deprived of serving other industrial and municipal customers presently receiving central station service from petitioner. (R. 5-6)

REASONS FOR GRANTING THE WRIT

1. The importance of the question

The question presented by this case is of far reaching importance which should be resolved by this Court—should the scope of the provision of Section 10(a) of the Administrative Procedure Act which grants judicial review to any person adversely affected or aggrieved by agency action within the meaning of any relevant statute be restricted as it has been by the decision below. Few questions are of greater importance in this day when the actions of administrative agencies have such a pervasive effect on the personal and property rights of all. The decision below holds that, even though a person suffers economic loss as a result of administrative action in violation of statutory authority, there is no right to be heard in the courts. Such a decision, even if it were correct, requires review by this Court because of the widespread implications for our system of government and ordered liberty under law which are raised by the threat of unreviewable administrative power. The need for review becomes imperative since the decision below thwarts the objective of Congress in the Administrative Procedure Act, conflicts with views expressed by this Court in *Heikkila* v. *Barber*, 345 U.S. 229, and is wrong.

Passed after a decade of study and concern with the ever-growing administrative process and the need for

keeping it within proper bounds, the Administrative Procedure Act, although brief, "is a comprehensive charter of private liberty" which "emphasizes the tripartite form of our democracy and brings into relief the ever essential declaration that this is a government of law rather than of men."—Foreword by the Chairman of the Senate Committee on the Judiciary to the Legislative History, Administrative Procedure Act, Senate Document No. 248, 79th Congress, 2d Session. The Administrative Procedure Act is thus a "charter of freedom" in the field of administrative law, similar to the Sherman Act in the economic field, which must be applied to achieve its broad purposes with a "generality and adaptability comparable to that found to be desirable in constitutional provisions."—*cf. Appalachian Coals* v. *United States,* 288 U.S. 344, 359-360. As stated by this Court in *Wong Yang Sung* v. *McGrath,* 339 U.S. 33 at 41, " ... it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the [Administrative Procedure] Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." The legislative history of the Administrative Procedure Act demonstrates that one of the purposes of Congress was to broaden the scope of judicial review of administrative action as an indispensable aid in preventing "the arbitrary exercise of powers or assumption of powers not granted", and in making certain that statutes are not "blank checks drawn to the credit of some administrative officer or board"—see Senate Document No. 248, *supra,* pages 212, 217, 275, 281-282, 311, 318-319, 368. This history led this Court to say in *Heikkila* v. *Barber,* 345 U.S. 229, 232, that:

> "... The spirit of those statements [in the Senate and House Committee Reports] together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that § 10 greatly expanded the availability of judicial review."

Despite all this, the Court of Appeals has here construed the judicial review provisions of the Administrative Procedure Act in a narrow fashion which drains them of vitality, reduces them to a mere needless restatement of prior law, and completely defeats the Congressional purpose of expanding the availability of judicial review, which is demonstrated by the express language of the Act and its legislative history.

Petitioner, on the basis of the allegations in its complaint, meets every requirement of the Administrative Procedure Act for judicial review. Except where statutes preclude judicial review or agency action is by law committed to agency discretion, Section 10 of the Administrative Procedure Act grants judicial review to either (1) any person suffering legal wrong because of agency action, or (2) any person adversely affected or aggrieved by agency action within the meaning of any relevant statute. The Rural Electrification Act does not preclude judicial review and the approval of rural electrification loans is not committed by law to agency discretion. Petitioner is a person and the approval and administration of the challenged loan is agency action as those terms are defined in Section 2 of the Administrative Procedure Act. The Rural Electrification Act is a relevant statute, since the purpose of the central station service limitation was to protect utilities against federally financed competition for customers already receiving

central station service.* Moreover, the term "relevant" has the broadest possible meaning since both the Senate and House Committee Reports on the Administrative Procedure Act stress that the law "so made relevant is not only constitutional law but any and all applicable law"—Senate Document No. 248, *supra*, pages 212, 276. Finally, petitioner is "adversely affected or aggrieved" by agency action within the meaning of the Rural Electrification Act by virtue of the economic loss it is suffering as a result of the challenged loan—*F.C.C.* v. *Sanders Radio Station*, 309 U.S. 470, 476-7.

The holding of the Court of Appeals that petitioner nevertheless has no right to judicial review reduces the "adversely affected or aggrieved" provision of Section 10(a) of the Administrative Procedure Act to meaningless tautology, affording judicial review only when the "relevant statute" itself grants judicial review. That amounts to turning the Act upside down, since the Act starts from the premise that judicial review is granted "Except so far as (1) statutes preclude judicial review". Such a redundant and illogi-

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* The Solicitor of the Department of Agriculture in a 1942 opinion said the following about the central station service limitation:

> ". . . Practically the entire debate on the limiting clause here under discussion centered about the question of competition. It seems clear from the legislative history that the intent of the limitation was to prevent loans that would create federally-financed competition with existing utility enterprises. . . ."

See transcript of hearings before a Subcommittee of the Senate Committee on Agriculture Appropriations for 1951, 81st Congress, 2d Session, 1378-1379, and see also similar statements by the Solicitor of the Department of Agriculture in a 1948 opinion at page 19568 of the same transcript.

cal result is not lightly to be imputed to Congress. The shambles it makes of the carefully considered and broadly purposed Administrative Procedure Act calls for review by this Court.

2. The need for review because of the concentration of litigation in the District of Columbia Circuit

In addition to the foregoing, there are special circumstances which emphasize the need for review by this Court.

For reasons of jurisdiction and venue, litigation against federal officers and administrative agencies is necessarily concentrated in the District of Columbia Circuit where the great majority of them have their official headquarters, except where statutes expressly provide for judicial review or action in some other circuit. Accordingly, it is extremely unlikely that the Court of Appeals for any other circuit will have an opportunity to construe the judicial review provisions of the Administrative Procedure Act in a case similar to this. The question cannot be left to ripen through the possibility of the development of a conflict between the Courts of Appeal.

The law is now settled in the District of Columbia Circuit. Five of the nine present judges of the Court of Appeals are now on record in this case and in *Kansas City Power & Light Co.* v. *McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924, cert. den. 350 U.S. 884, in support of the proposition that Section 10(a) of the Administrative Procedure Act merely codified then existing law with respect to the right of judicial review. Since there is no hope of relief from the Court of Appeals for the District of Columbia Circuit, and since litigation of this kind is necessarily con-

centrated in that Circuit, it is essential that this Court exercise its supervisory power and review the important question presented. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50.

3. The effect of Kansas City Power & Light Co. v. McKay

The Court of Appeals in this case relied on *Kansas City Power & Light Co.* v. *McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924, in which this Court denied certiorari, 350 U.S. 884. That denial is not dispositive here, since it means only that for some reason the petition in that case did not commend itself to four Justices of this Court. In any event, the *Kansas City* case is a far cry from this case. It presented a tremendously complicated situation concerning a large public power project involving the interrelationship of three government agencies and their operations under three statutes. Here there is a simple factual situation involving a loan of about $120,000 under one statute, the Rural Electrification Act, made by one administrative agency. In *Kansas City*, there had been a trial of the principal issue with a judgment on the merits adverse to plaintiffs, before the Court of Appeals determined that there was no standing. Here there has been no trial and no determination of the merits. The *Kansas City* case also was concerned primarily with generation and transmission of power at the wholesale level, while this case deals solely with distribution to an ultimate consumer; petitioner believes and urged below that this difference distinguishes the cases because the central station service limitation of the Rural Electrification Act is clearly relevant where relations with an ultimate consumer are disturbed, but the Court of Appeals held that this difference was not decisive. Both cases involve the

basic question of the right of a privately owned utility company to challenge the legality of a rural electrification loan which adversely affects or aggrieves such company by depriving it of the opportunity to serve existing customers. This case, however, presents the issue in a sharp and simple situation, divorced from any other issues, which commends it for review.

CONCLUSION

If the decision below stands, a substantial blow has been dealt to the system of checks and balances devised by Congress in the Administrative Procedure Act to prevent unlawful administrative action. For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

E. FONTAINE BROUN
JOHN H. PICKERING
HENRY T. RATHBUN
Attorneys for Petitioner

WILMER & BROUN
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13570

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, APPELLANT

v.

EZRA TAFT BENSON, Individually and as Secretary of Agriculture, et al., APPELLEES.

Appeal from the United States District Court for the District of Columbia

---

Decided February 28, 1957, as amended March 12, 1957

Mr. Henry T. Rathbun, with whom *Mr. E. Fontaine Broun* was on the brief, for appellant.

Mr. Melvin Richter, Attorney, Department of Justice, with whom *Assistant Attorney General George Cochran Doub* and *Mr. Oliver Gasch*, United States Attorney, were on the brief, for appellees.

Before EDGERTON, Chief Judge, and PRETTYMAN and BURGER, Circuit Judges.

PER CURIAM: The District Court was unable to distinguish this case from *Kansas City Power & Light Company* v. *McKay*[1] and therefore concluded as a matter of law that the plaintiff, Iowa-Illinois Gas and Electric Company, had no standing to sue. Upon that basis the trial judge denied the plaintiff's motion for a preliminary injunction. This appeal followed.

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[1] 96 U.S. App. D.C. 273, 225 F.2d 924 (1955), *cert. denied*, 350 U.S. 884, 100 L.Ed. 780, 76 S.Ct. 137 (1955).

Appellant would distinguish the *Kansas City* case, but we are unable to find decisive differences. The order of the District Court must therefore be affirmed and the case remanded with directions to dismiss the complaint.

Affirmed and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,570

January Term, 1957.

C. A. 3632-56

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, APPELLANT

v.

EZRA TAFT BENSON, Individually and as Secretary of Agriculture, et al., APPELLEES.

Appeal from the United States District Court for the District of Columbia

Before: EDGERTON, Chief Judge, and PRETTYMAN and BURGER, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: February 28, 1957.

Per Curiam.

Amended by order of Court 3-12-57

Filed Mar. 12, 1957

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,570

January Term, 1957.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, APPELLANT

v.

EZRA TAFT BENSON, Individually and as Secretary of Agriculture, et al., APPELLEES.

Before: EDGERTON, Chief Judge, PRETTYMAN and BURGER, Circuit Judges, in Chambers.

Order

It is ORDERED by the Court that the second paragraph of the judgment entered herein February 28, 1957, be, and it is hereby, amended to read as follows:

> ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and it is hereby, affirmed and that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the complaint.

Per Curiam.

Dated: March 12, 1957

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JOHN T. ..., Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 144

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, *Petitioner*

v.

EZRA TAFT BENSON, Individually and as SECRETARY OF AGRICULTURE, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1036

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, *Petitioner*

v.

EZRA TAFT BENSON, Individually and as SECRETARY OF AGRICULTURE, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

The Government seems to think that "basically inconsistent" decisions by the Circuits require review only of the case the Government loses—compare the Government's opposition to certiorari in this case with its petition in No. 1151, *Panama Canal Company,*

Petitioner, v. *Grace Line, Inc., et al.* In view of this approach, we submit this reply brief to show why review of this case is required because of the "inconsistent" decisions and the importance of the question presented.

The petition for certiorari stressed the importance of the question presented as to the scope of standing to sue under Section 10(a) of the Administrative Procedure Act, and stated that it was unlikely that any conflict would develop between the Circuits on the question (Pet. 6-11). The unlikely has now happened, and a conflict has developed. The Solicitor General with his customary and commendable candor first called attention to this in the brief in opposition (pp. 10-11) by discussing the then unreported opinion of the Court of Appeals for the Second Circuit in *Grace Line* v. *Panama Canal Company*, decided April 8, 1957 (which has just been reported in the advance sheets for July 1, 1957, 243 F. 2d 844), and by stating that a petition for a writ of certiorari would be filed in that case raising the standing issue. That petition was filed on July 6, 1957, *Panama Canal Company, Petitioner* v. *Grace Line, Inc., et al.*, No. 1151. It vigorously raises the issue of standing to sue and devotes over five pages to discussing why certiorari should be granted because of the conflict on the issue—see petition in No. 1151, pp. 22-28.

Certiorari should be granted in this case because of the importance of the standing to sue issue and the conflicting views which have been taken on it by the District of Columbia and the Second Circuits. In opposing certiorari respondents do not argue that the question is unimportant, or that there is no conflict.

Instead, the thrust of their argument is merely that the decision below is correct, that it *may* be possible to dispose of *Grace Line* without reaching the standing issue if certiorari is granted in that case, and that the factual situations are different (Br. in Opp. 10-11). These are unconvincing reasons for denying certiorari in a matter of this importance on which conflicting results have been reached by the District of Columbia and the Second Circuits.*

The opinion of the Second Circuit in *Grace Line* is now reported at 243 F. 2d 844 and is printed in the appendix to the petition in No. 1151. *Grace Line* is an action by users of the Panama Canal to compel a government corporation, the Panama Canal Company, to set tolls under the Act of September 26, 1950, 64 Stat. 1038, amending Sections 411 and 412, Title 2, of the Canal Zone Code, effective as of July 1, 1951 (referred to in the opinion and hereinafter as the Panama Canal Act of 1912 as amended in 1950). The

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* The petition in *Grace Line* states (Fn. 59, pp. 26-27) that, although the holdings are "basically inconsistent", the Government is opposing certiorari in the instant case because the decision "is so clearly correct and is in such accord with controlling precedents that it needs no review by this Court." This argument is no ground for denying certiorari, particularly since it is unsound. It glosses over the fact that the "controlling precedents" on standing cited in the *Grace Line* petition were decided before the enactment of the Administrative Procedure Act, except for the decisions of the Court of Appeals for the District of Columbia Circuit in *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, cert. denied, 350 U.S. 884, in *Benson* v. *Schofield*, 236 F. 2d 719, cert. denied, 352 U.S. 976, and in this case. *Benson* v. *Schofield* does not deal with the Administrative Procedure Act. We have pointed out in our petition (pp. 6-10) how the decision in this case (and in *Kansas City* on which it is based) incorrectly restricts Section 10(a) of the Administrative Procedure Act contrary to its express language and its legislative history.

complaint was dismissed for want of jurisdiction, but the Second Circuit, speaking through Chief Judge Clark, reversed and held that plaintiffs-appellants had standing to sue. After pointing out that there "is nothing in §§ 411 and 412 expressly authorizing or expressly precluding judicial review", the Court found statutory support for standing to sue in Section 10(a) of the Administrative Procedure Act, holding:

> "Nor is there any lack of standing to sue. Section 10(a) of the Administrative Procedure Act, 5 U. S. C. §1009(a), confers standing on persons 'suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute,' and the plaintiffs can point to the Panama Canal Act of 1912, as amended in 1950, as well as the Hay-Pauncefote Treaty, as their statutory authority."

See 243 F. 2d at 853 and 856.

Respondents concede that "the general approach of the Court of Appeals for the Second Circuit to the question of standing in the *Grace Line* case appears to be inconsistent with that taken in the instant case" (Br. in Opp. 10). Actually, the conflict between this case and *Grace Line* is much more substantial and direct. The Government admits as much, both by what is not denied about the conflict on standing in the brief in opposition here and by what is said about the conflict in the petition in *Grace Line*—see pp. 22-28 of that petition, and particularly the discussion at pp. 25-27 of Section 10(a) of the Administrative Procedure Act and of *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, certiorari denied, 350 U.S. 884. *Kansas City* was the sole authority on which the instant case was decided.

It is true that the factual situations are different. It is also true that the "relevant statutes" are not the same—the Panama Canal Act of 1912 as amended in 1950 is the "relevant statute" in *Grace Line* and the Rural Electrification Act as amended is the "relevant statute" in this case. Nevertheless, from the standpoint of being "relevant statutes" under Section 10(a) of the Administrative Procedure Act, the statutes are substantially similar. This is apparent from the statutes themselves—thus, neither statute expressly provides for judicial review; neither contains any reference to persons who may be "adversely affected or aggrieved"; and both fix standards by which governmental agencies are to conduct governmental functions, i.e., the making of loans for rural electrification under the Rural Electrification Act and the fixing of tolls for the use of the Panama Canal under the Panama Canal Act of 1912 as amended. The similarity of the statutes from the standpoint of "relevancy" is even more apparent from respondents' common characterization of both statutes as non-regulatory statutes which were not intended to confer any rights on private parties. Thus, respondents state that the Rural Electrification Act "does not in terms confer any rights upon the power companies . . . [and] does not regulate or impose restraints upon the manner in which Iowa-Illinois conducts its business" (Br. in Opp. 5-6) and similarly that the Panama Canal Act as amended is "a statute dealing with the non-regulatory management of public property and conferring no rights upon the users of this property" (Br. in Opp. 10). If the one statute is a "relevant statute" under Section 10(a) of the Administrative Procedure Act, so is the other.

Accordingly, there is a substantial conflict between the District of Columbia and the Second Circuits as to the availability of judicial review under the clause of Section 10(a) of the Administrative Procedure Act which grants judicial review to any person adversely affected or aggrieved by agency action "within the meaning of any relevant statute". This conflict is heightened by the rejection in *Grace Line* of the argument accepted below and renewed here (Br. in Opp. 6-7) that the petitioner's sole relief is review by superior executive and legislative authority. As stated in *Grace Line* (243 F. 2d 857), "For the person unable to get redress from the busy legislature or White House the courts remain open". And we submit that it is a matter of transcendent importance that they remain open.

The Government argues that the consequences of the broad concept of standing to sue adopted by the Second Circuit in *Grace Line* are "momentous" (petition in No. 1151, p. 27). We think, as urged in our petition (p. 6), that it would be equally momentous if the restricted concept adopted by the District of Columbia Circuit should be permitted to stand. The two cases present fundamentally opposed views as to the meaning of Section 10(a) of the Administrative Procedure Act. It is for this Court to make the ultimate decision whether under that Section the courts, in situations such as these, are open to private persons to challenge administrative action, as held in *Grace Line*, or are closed as held by the decision below. In these days of ever increasing administrative action few matters are of more basic concern to our system of government and our regard for individual rights. We repeat that, if the decision below stands, a substantial blow has

been dealt to the system of checks and balances devised by Congress in the Administrative Procedure Act to prevent unlawful administrative action.

For the reasons stated in the petition and in this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY,
PETITIONER

v.

EZRA TAFT BENSON, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PETITIONER IN OPPOSITION TO MEMORANDUM FOR RESPONDENTS SUGGESTING THAT THE CASE IS MOOT

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BRIEF OF PETITIONER IN OPPOSITION TO MEMORANDUM FOR RESPONDENTS SUGGESTING THAT THE CASE IS MOOT

PRELIMINARY STATEMENT

This brief is submitted to demonstrate why this case is not moot and why respondents' request that it be dismissed as moot should be denied.

The case is not before this Court on the merits which indeed have not been passed upon by any court. The petition for a writ of certiorari is from a judgment of the Court of Appeals for the District of Columbia Circuit directing dismissal of the complaint for lack of standing to sue. Since respondents' suggestion of mootness is directed to the merits of the action, it must

of course be conceded, for the purposes of considering such suggestion and this opposition, that petitioner had standing to bring, and has standing to maintain, the action.

The complaint herein prayed for declaratory and injunctive relief together with "such other and further relief as to the Court may seem just and proper" (R. 2, 8, 9). Briefly the circumstances as revealed by the abbreviated record* herein are as follows:

Petitioner, an electric utility company, brought this action for declaratory, injunctive and incidental relief against a Rural Electrification Administration loan the sole purpose of which was to finance construction of a transmission line to serve the requirements of certain additional facilities of an industrial customer then receiving central station service from petitioner (R. 4-5). The loan challenged was to Central Iowa Power Cooperative (hereinafter called CIPCO), a generating and transmission cooperative, the supplier of power to Greene County Rural Electric Cooperative (hereinafter called Greene County Coop), a distribution cooperative (R. 4-5). Under the Rural Electrification Act loans are authorized only "for the furnishing of electric energy to persons in rural areas who are *not* receiving central station service."** The term "central station service" is not defined in the Act, but it is

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* Such record consists of the complaint, motion for preliminary injunction, affidavits filed in connection therewith and proceedings thereon (all of which are contained in the Joint Appendix below, nine copies of which have been furnished to this Court), and the proceedings in the Court of Appeals. The answer of respondents, filed while the case was on appeal, is not part of such record. There has been no trial or determination of the merits.

** Section 4 of the Rural Electrification Act of 1936, as amended, 7 U. S. C. § 904.

a term generally used in the electric industry to mean electricity received from a central generating station as distinguished from an individual generating unit such as a Delco plant.

The verified complaint alleges in substance as follows:

Petitioner (or its predecessor) has for years been furnishing central station service to an industrial customer, Lehigh Sewer Pipe and Tile Company (hereinafter called Lehigh Pipe) (R. 4). In 1955 that Company decided to build certain additional plant facilities on the same plot of ground on which the plant served by petitioner is located (R. 4). At the request of Greene County Coop, CIPCO included in an application to REA a loan to finance construction of a transmission line which had as its sole purpose to enable Greene County Coop to be in position to serve the electric requirements of the addition to Lehigh Pipe's plant facilities (R. 5). Petitioner's predecessor had offered to provide the electric requirements of Lehigh Pipe's additional facilities, but following REA approval of that loan, Lehigh Pipe refused the offer. It then entered into a 20 year contract with Greene County Coop to receive the electric requirements of its additional facilities from such Coop over the transmission line to be built with the REA-loaned funds (R. 5-6).

Since Lehigh Pipe *was* receiving central station service at the time of the loan, there was no authority under the Rural Electrification Act to make a loan to build a transmission line to supply the power requirements of the addition to Lehigh Pipe's facilities (R. 5-6).

The complaint also alleges the existence of an unlawful and continuing conspiracy among respondents and

representatives of Greene County Coop and CIPCO as a result of which the qualification of Lehigh Pipe as a proper beneficiary under the Rural Electrification Act was and remains approved (R. 7, 8). It is further alleged that petitioner is and will continue to be, at least until the end of the 20 year contract, damaged as a direct result of the illegal loan and conspiracy in that it is excluded from furnishing the additional power requirements of its customer Lehigh Pipe and may be deprived of serving other industrial and municipal customers presently receiving central station service from petitioner (R. 6-8).

PROCEDURAL HISTORY OF THE CASE

Petitioner has pressed this case with diligence. The complaint was filed August 31, 1956, several days after final approval of the construction of the transmission line by the Iowa State Commerce Commiss[illegible] before which the complaint might have been premature. A motion for preliminary injunction was filed with the complaint. On September 24, 1956, the District Court by informal memorandum denied the motion for preliminary injunction. On September 26, 1956, the District Court entered conclusions of law and an order denying the motion on the sole ground that petitioner had no standing to sue. On the same date the District Court denied an oral application by petitioner for a stay pending appeal. On September 27, 1956, petitioner filed a notice of appeal. Petitioner filed its brief in the Court of Appeals on October 19, 1956, thirty-three days before such brief was required under the Rules and on November 14, 1956, the petitioner filed a motion which was granted to advance the case on the calendar for early hearing. The Court of Appeals decided the case on February 28, 1957, and amended its opinion

and judgment on March 12, 1957. The petition for writ of certiorari was filed herein on May 28, 1957. This Court has not yet acted on that petition and is presumably holding it in connection with *Panama Canal Company* v. *Grace Line, Inc., et al.*, No. 251, which involves a similar question as to standing to sue under Section 10(a) of the Administrative Procedure Act and which is to be argued shortly.

While petitioner has thus been diligently proceeding to try to get a decision on its standing to challenge the validity of the questioned loan, respondents have nevertheless apparently proceeded to disburse that loan. They now claim that the case has been thereby mooted, relying solely on an affidavit of David A. Hamil, Administrator of the Rural Electrification Administration, which states that all obligations of the REA to advance funds under the loan agreement have been performed. Petitioner has no reason to doubt the accuracy of those statements, but submits that such statements do not justify the legal conclusion that the case is moot.

SUMMARY OF ARGUMENT

This case has not been mooted by respondents' action in advancing all funds under the challenged loan agreement. Defendants in injunction actions who complete the acts sought to be enjoined do so at their peril and do not thereby create mootness. Jurisdiction remains to award mandatory and incidental relief. *Texas & New Orleans Railroad* v. *Northside Belt Railway*, 276 U. S. 475; *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1; *Ramsburg* v. *American Investment Co.*, 231 F.2d 333. At this preliminary stage of the case, before trial and determination of the facts and equities, it is impossible to say precisely what relief may be awarded to petitioner, but it cannot be said

that petitioner is entitled to none. Depending upon the extent to which petitioner is able to prove the allegations of the complaint and what proof is submitted by respondents, petitioner may be entitled to mandatory relief, declaratory judgment, or damages or other incidental relief.

This case also falls within the rule that cases will not be dismissed as moot, even where there is some technical basis for doing so, if (1) the act complained of may have a continuing effect or be renewed, or (2) the question presented is one of public importance, or (3) the interpretation of a statute or regulation is involved and the decision may provide a useful guide for future administrative action. *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498; *Gay Union Corp.* v. *Wallace*, 112 F. 2d 192; *Walling* v. *Haile Gold Mines, Inc.*, 136 F. 2d 102.

The cases cited in the memorandum of respondents are no authority for concluding that this case is moot. None have any factual similarity to this case and all are completely distinguishable. They are cited by respondents simply for the proposition, with which petitioner does not quarrel, that when this Court decides that a case is moot and should be dismissed for that reason, the proper procedure is to vacate the judgments below and to remand with a direction of dismissal.

ARGUMENT

I. The Case Is Not Moot

This case is not moot. The affidavit and the memorandum of respondents constitute nothing more than a bare assertion that the respondents by completing the challenged action can deprive an equity court of its jurisdiction by shouting "Moot". That course has been tried before. Significantly respondents have not

cited any cases where it has been successful. Understandably, the law does not permit such a shocking result—of letting defendants end cases by the simple expedient of their completing challenged action before there has been a final decision as to whether it should be restrained. It has long been held that defendants in injunction actions who complete the acts sought to be enjoined do so at their peril, and cannot insulate themselves by their own action. Courts in protecting their jurisdiction from such attempts at defendant-made mootness have caused buildings built to be torn down and buildings torn down to be rebuilt.

In *Texas & New Orleans Railroad* v. *Northside Belt Railway,* 276 U. S. 475, an injunction was sought against, *inter alia,* the construction of a railroad line. The District Court denied the injunction on the merits. The Circuit Court of Appeals affirmed the decree of the District Court without passing on the merits, holding that the cause had become moot because defendants had completed construction of the railroad and it was in operation. After first stating that there was no basis in the record for finding that construction of the railroad had been completed or that it was in operation, Mr. Justice Brandeis speaking for a unanimous Court stated at page 479:

> "Moreover, the facts erroneously found [completion of action sought to be enjoined] would not, if true, have rendered the case moot. For where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the status quo."

Again in *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, 15-16, this Court stated, unanimously

as to this point:

> "The rule is well settled, both by the courts of England and of this country, that where a suit is brought to enjoin certain acts or activities, for example, the erection of a building or other structure, of which suit the defendant has notice, the hands of the defendant are effectually tied pending a hearing and determination, even though no restraining order or preliminary injunction be issued."

and at pages 17-18:

> "The conclusion to be drawn from all the cases is that after a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided."

Ramsburg v. *American Investment Co.*, 231 F. 2d 333 (7 Cir.) discusses at considerable length decisions by this Court and others as to alleged mootness where defendants have elected to complete actions sought to be enjoined. That opinion states at p. 336:

> "Applying these decisions we are able to formulate the question for determination where, as here, a cause for injunctive relief is met by a contention of mootness because the status of the parties and of their relationship to the subject matter is changed. The decisive issue is whether the subject matter may yet be reached by the mandatory power of equity and the status quo restored. If so, the cause is not moot. [citations.] And even where the subject matter has been so completely destroyed as to preclude restoration of the status quo, the court still has jurisdiction to grant incidental relief and the cause is not moot. [citations.]"

It has been noted in several of the leading decisions of this Court where cases were dismissed as moot that the result might well have been otherwise if the claim of mootness had rested on the actions of the defendant instead of on the plaintiff's own act or that of a power beyond the control of either party. See *Mills* v. *Green*, 159 U. S. 651, 654; *United States* v. *Hamburg-American S. S. Co.*, 239 U. S. 466, 477. Significantly, all of the cases cited by respondents presented situations where; (1) the relief sought had been achieved, (2) the controversy had been settled by the parties, or (3) extrinsic circumstances had rendered impossible the relief sought. Those cases are discussed in detail at pages 14-17 hereof.

The declaratory relief sought by petitioner in the complaint herein is still appropriate. The statutory language in that regard reads in relevant part: "In a case of actual controversy * * *, any court of the United States, * * *, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought." 28 U. S. C. § 2201, 62 Stat. 964, as amended. Even without reference to the Declaratory Judgment Act, the courts have held that where a case at its inception was proper for injunctive relief and included a prayer for a declaration of the rights of the parties, the removal by defendant during the pendency of the suit of the grounds for injunctive relief, did not deprive the courts of jurisdiction to declare the rights of the parties. *Barrett* v. *Denver Tramway Corp.*, 146 F. 2d 701, 702 (3 Cir.), *Ramsburg* v. *American Investment Co., supra,* at 336, and *United States* v. *Bates Valve Bag Corp.*, 39 F. 2d 162, 164 (D. C. Del.). The holdings in those cases are in line with the statements of this Court in *Mills* v. *Green, supra,* and *United*

States v. *Hamburg-American S. S. Co., supra,* that a defendant by its own act cannot remove the actuality of a controversy so as to defeat the jurisdiction of the courts.

Since the instant case has not been presented to the trial court on the merits, the equities of the parties have not been determined and, indeed, could not be on the basis of the scant record. It is, therefore, impossible to say what relief petitioner may be entitled to, but it cannot be said that petitioner is entitled to none. Certainly the circumstance that petitioner may no longer be able to get the challenged loan restrained is no basis for concluding that petitioner cannot get any relief. Depending upon the extent to which petitioner is able to prove the allegations of its complaint and upon what the proofs of respondents are, it is conceivable that the trial court might award the following kinds of relief, consistent with the prayers of the complaint, if it should find, as petitioner is confident it will, that the challenged loan is illegal:

(1) A mandatory order might be issued directing the respondents to recoup the loan. In this connection, the loan agreement in question is not in the record. Petitioner does not know its contents or what provisions it contains, if any, respecting repayment in the event the loan is found to be illegal or it is proved that the borrowers engaged in misrepresentation.

(2) Declaratory judgment might be issued that the loan is illegal. The self-enforcing tendency of such a judgment is noted by one of the leading authorities on the technique (Borchard, *Declaratory Judgments* (2d Ed., 1941), Preface, p. xv). Faced with such a judgment, respondents might initiate action to undo their illegal work.

(3) Respondents are sued individually as well as in their official capacities. Damages might be awarded against them for the harm done to petitioner by their illegal action.

(4) Relief might be given against the continuing conspiracy alleged in the complaint.

It is immaterial that relief along the foregoing lines may not give petitioner the full relief it sought at the outset, and it is likewise immaterial that it may eventually be found that petitioner is not entitled to any relief. This case is not moot so long as it is conceivable that any relief can be given to petitioner. At this preliminary stage, before there has been a trial and any determination of the facts and equities, it cannot be said that petitioner is entitled to no relief. Moreover, such a decision is a matter which this Court should not undertake in the first instance. The trial court should perform that function. Accordingly, this Court should reject respondents' assertion that they have mooted the case by their actions, and should let the case follow the orderly judicial procedure of leaving the question of fact finding and relief to the sound discretion of the trial court exercising its equity powers. *Cf. SEC* v. *Okin*, 132 F. 2d 784, 787 (2 Cir.). Otherwise, petitioner will be denied its day in court and its opportunity to demonstrate that it is entitled to relief, simply because respondents have been able to disburse the challenged loan while the case has been pending on appeal on the question of standing to sue.

II. Even If the Case Could Be Regarded as Technically Moot It Should Not Be Dismissed

While the Federal courts have carefully avoided passing on abstract or hypothetical questions where decisions would constitute nothing but advisory opin-

ions, they have been equally zealous in retaining jurisdiction of cases urged as moot when they believed that the decision would affect existing and future rights. The reasons asserted for retaining jurisdiction of such cases have not always been uniform, but may be categorized generally as follows:

> (1) When the act against which specific relief is sought may have a continuing effect or may be renewed;
>
> (2) Where the question presented is one of public importance; and
>
> (3) Where the case involves interpretation of a statute or regulation and decision thereof may provide a useful guide for future administrative action.

The Courts have on occasion found more than one of the foregoing situations to be presented in cases and have stated them as alternate bases for refusing to dismiss cases as moot. *E.g.: Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498; *Gay Union Corp.* v. *Wallace,* 112 F. 2d 192 (D. C. Cir.); *Walling* v. *Haile Gold Mines, Inc.,* 136 F. 2d 102 (4 Cir.).

In *Southern Pacific Terminal Co.* v. *ICC, supra* at 515, it was held, where an order of the Commission had expired by its terms, that an action to enjoin such order as illegal would not be dismissed as moot, stating:

> "The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at

> one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

As an alternate ground of its decision the Court cited *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, for the proposition that a case presenting a question of public importance will not be dismissed as moot. The fact that the party seeking the determination of such a question was a private citizen rather than the Government was held not to lessen the necessity for the court's continuing its jurisdiction to decide a question of public import.

The instant case presents both the bases for which the Court refused to dismiss the *Pacific Terminal* case. Here instead of a two year order which expired pending final judicial action we have an REA loan capable (as has been demonstrated) of being fully disbursed to the borrower prior to judicial determination as to its legality. Obviously the completion of the loan to that extent does not remove its adverse effects on petitioner which may have to endure them at least for the 20 year period of the contract between its customer Lehigh Pipe and Greene County Coop. Also presented herein is a question of public importance—namely, can the REA make 2 per cent loans to build facilities to serve persons already receiving central station service from an established utility company, although the Act limits such loans to providing service to "persons who are *not* receiving central station service". On that point Representative Rayburn, who was Chairman of the House Committee having jurisdiction of the bill which became the Act, stated:

> "May I say to the gentleman that we are not in this bill, intending to go out and compete with anybody. By this bill we hope to bring electrifica-

> tion to people who do not now have it. This bill was not written on the theory that we were going to punish somebody or parallel their lines or enter into competition with them." *

It is of substantial public significance to have a determination of the above-stated question. Such a determination will also serve the useful purpose of being a guide to respondents in passing upon other loan applications. *Cf. Gay Union Corp.* v. *Wallace, supra; Walling* v. *Haile Gold Mines, Inc., supra; Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (8 Cir.); and *Boise City Irrigation Co.* v. *Clark*, 131 Fed. 415 (9 Cir.).

III. The Cases Relied on by Respondents Do Not Support the Conclusion That This Case Should Be Dismissed As Moot

Respondents have cited nine decisions of this Court in their memorandum (p. 3). Those decisions are not cited for the proposition that this case is moot, but simply for the proposition, with which petitioner does not quarrel, that when this Court decides that a case is moot and should be dismissed for that reason the proper procedure is to vacate the judgments below and to remand with a direction of dismissal.

Analysis of the decisions cited by respondents shows that they are no authority for concluding that this case is moot. None of them bears any factual similarity to the instant case and none of them involves a situation where the basis of the asserted mootness was that the defendant had completed the action sought to be enjoined. Rather, as stated at page 9 above, the cited decisions presented situations where (1) the relief sought had been achieved, (2) the con-

* 80 Cong. Rec. 5283.

troversy had been settled by the parties, or (3) extrinsic circumstances had interfered to render impossible the relief sought.

In three of the decisions cited the relief sought had been obtained.

Cozart v. *Wilson*, 352 U. S. 884, and *Garcia* v. *Landon*, 348 U. S. 866, where *habeas corpus* proceedings where the petitioners had been released from restraint before final action by this Court. *Eastern Airlines* v. *CAB*, 341 U. S. 901, also involved a situation where defendant prior to final action by this Court had remedied the situation complained of by the plaintiff. The CAB, without holding a hearing, had issued an exemption order permitting Capital Airlines to serve certain territory. Eastern Airlines contended that such an exemption order could not legally be granted by the Board without a hearing. That question was presented to this Court by petition for certiorari. Before determination of that question by this Court, the CAB *after a full hearing* had given Capital Airlines the same authority by a certificate of necessity rather than by exemption.

The subject matter of the controversy had been settled in *Brotherhood of Locomotive Firemen and Enginemen* v. *United States*, 343 U. S. 971. It was an action brought by the United States after it had taken over operation of the railroads, pursuant to Executive Order, to enjoin the Brotherhoods from striking after a strike call had been issued. From a temporary injunction entered by the District Court a petition for certiorari was filed in this Court. After the filing of the petition, the wage dispute, which was the apparent basis for the strike, was settled and the railroads restored to private ownership. Since the subject matter of the controversy had been settled, and the United

States after relinquishing control of the railroads was no longer a proper party to the action, it was directed to be dismissed as moot.

In the other cases * cited by respondents, extrinsic circumstances rendered impossible the relief sought. In *United States* v. *Munsingwear*, 340 U. S. 36, the United States had filed an injunction suit against defendant to compel compliance with a maximum price regulation. The District Court had determined that defendant was not in violation of such regulation. Pending an appeal from that decision, the regulation was annulled by the President. The Court of Appeals held that since there was no law which would sustain the injunction sought by the plaintiff, the case was moot. The only question passed on by this Court was whether to vacate the judgments below and direct dismissal of the case or to leave intact the judgment of the District Court. The former course was ordered. *Los Angeles Building & Construction Trades Council* v. *Le Baron*, 342 U. S. 802, involved a petition for certiorari from a District Court injunction which by its express terms dissolved upon final adjudication by the National Labor Relations Board of the matters involved in the action. Pending determination by this Court final adjudication was made by the NLRB and the injunction by its terms expired. Similarly in *SEC* v. *Harrison*, 340 U. S. 908, a preliminary injunction expired by its own terms pending decision of a petition for certiorari by this Court. And in *Howard* v. *United States*, 340 U. S. 898, a petition for certiorari was pending in this Court from a District Court order

* There is nothing in the opinion or the case file in *United States* v. *Amarillo-Borger Express, Inc.*, 352 U. S. 1028, which would indicate the basis of the mootness holding. A check at the Clerk's Office has revealed that the question of mootness appeared during oral argument.

committing a grand jury witness to custody until she indicated her desire to "return to the said Grand Jury" and truthfully testify. The grand jury referred to in the order of the District Court was discharged pending determination of the petition by this Court, thus making it impossible for the order of the District Court to be complied with.

It is accordingly apparent that none of the decisions cited by respondents constitutes any authority for the proposition that this case is moot.

CONCLUSION

Petitioner submits that it is repugnant to the very nature of justice to permit a defendant in an action seeking injunctive and other relief to be able to nullify the jurisdiction of a court of equity simply by completing the action sought to be enjoined. In the absence of trial and on the basis of the scant record in this case, this Court should not deprive the District Court of its jurisdiction to grant such mandatory or incidental relief as it may find to be required after the facts of the case have been fully developed. As recently as March 3, 1958, this Court emphasized:

> "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied power."

Harmon v. *Brucker*, ____ U. S. ____ (Nos. 80 & 141). It would be ironic indeed if petitioner is unable to have judicial relief against the acts of respondents which are claimed to be illegal, merely because respondents say they have finished their affirmative part in them, and presumably it merely remains for their successors to receive repayment years hence of the fully disbursed loan.

Having disposed of respondents' suggestion that subsequent developments have mooted this case, we conclude by pointing out that subsequent developments have strengthened the case for granting certiorari here. In addition to the reasons previously advanced—the importance of the question presented as to standing to sue under Section 10(a) of the Administrative Procedure Act and the conflict on that question with the decision of the Second Circuit in *Panama Canal Co.* v. *Grace Line, Inc., et al.*, No. 251—there are now the following additional reasons for granting certiorari:

1. The decision of the court below in this case conflicts, at least in principle, with the holding in *Harmon* v. *Brucker, supra,* and the express statements therein as to the right to judicial review of persons who have been injured by acts of Government officials in excess of their powers.

2. Certiorari has been granted in the *Grace Line* case, the Government's brief therein has been filed and the case is to be argued shortly. We have carefully examined the arguments contained in that brief as to standing to sue under Section 10(a) of the Administrative Procedure Act, which must of necessity be substantially the same in this case. We do not believe that such arguments constitute a valid basis for the restrictive interpretation of Section 10(a) which is urged in that brief. We think that the establishment of the right to judicial review in situations such as are presented in this case and in the *Grace Line* case is a matter of transcendent importance. If certiorari is granted in this case, we are confident that we can demonstrate that petitioner has a right to judicial review under Section 10(a). Petitioner satisfies every requirement of the language of that Section. The expanded avail-

ability of judicial review provided by the Administrative Procedure Act, *cf. Heikkila* v. *Barber*, 345 U. S. 229, 232, is part of the evolution of the law to meet the needs of the times. As the Court of Appeals stated in the *Grace Line* case, 243 F. 2d at 856, "The growing tendency of the courts and Congress has been to submit more matters once thought to concern internal government administration to examination in open court", and compare also the holding of this Court in *Harmon* v. *Brucker, supra.* The Government's position that Section 10(a) of the Administrative Procedure Act merely codified the pre-existing law on the subject of judicial review must be rejected.

For the reasons stated, petitioner submits that this Court should deny the request of respondents that this case be dismissed as moot and should instead grant the petition for certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 144

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, *Petitioner*

v.

EZRA TAFT BENSON, Individually and as SECRETARY OF AGRICULTURE, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Since it appears that the petition in this case has been held for the disposition of *Panama Canal Company* v. *Grace Line, Inc. et al.*, Nos. 251 and 252, petitioner submits this supplemental brief to point out why in the light of the decision in that case the petition in this case should now be granted.

This Court's decision in *Panama Canal* might well have been dispositive of this case, for the sole question

presented here of standing to sue under Section 10(a) of the Administrative Procedure Act as one adversely affected or aggrieved by agency action within the meaning of a relevant statute was also a question presented in *Panama Canal*. But this Court's decision of April 28, 1958, in that case is that the agency action complained of was "committed to agency discretion" and that judicial review was accordingly precluded by Section 10 of the Administrative Procedure Act. Since "agency discretion" is neither involved nor asserted in this case, the decision in *Panama Canal* is not dispositive of this case and affords no ground for denying the petition here.

Instead of agency discretion, this case involves a flat limitation on agency action which is fixed by statute and leaves no room for discretion—the central station service limitation of Section 4 of the Rural Electrification Act as amended, which authorizes the Administrator of the Rural Electrification Administration to make loans for the purpose of furnishing electric energy to persons "who are *not* receiving central station service." (Emphasis added). Significantly, at no time in the course of this action, have respondents suggested that the Administrator has any discretion to make a loan for the purpose of furnishing electricity to a person who is already receiving central station service. Also, respondents have not questioned that the term "central station service" while undefined in the Act means receiving electricity from a central generating station as distinguished from an individual generating unit, such as a Delco plant. Thus, this case does not present "matters on which experts may disagree" or [illegible]ice issues of judgment and choice, . . . which require the exercise of informed

discretion." Here, the statutory boundary which precludes making loans for furnishing electricity to persons already receiving central station service is simple and flat. Whether the complained of action transgresses it does not turn "on matters of doubtful or highly debatable inference from large or loose statutory terms, [where] the very construction of the statute is a distinct and profound exercise of discretion."

The fact that this Court, in deciding *Panama Canal,* did not reach the very important question of the availability of judicial review under Section 10(a) of the Administrative Procedure Act of agency action which is *not* committed to agency discretion points up the desirability of considering that question in this case, where it is presented in isolated and uncomplicated simplicity and without any assertion of agency discretion. For this and the other reasons which are elaborated in the petition and the reply brief filed in support thereof, it is respectfully urged that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 30, 1958

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1036

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, PETITIONER

v.

EZRA TAFT BENSON, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a–2a) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was originally entered on February 28, 1957 (Pet. App. 2a) and was amended on March 12, 1957 (Pet. App. 3a). The petition for a writ of certiorari was filed on May 28, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a private electric utility company has standing, under Section 4 of the Rural Electrification Act of 1936, as amended, or under Section 10 (a) of the Administrative Procedure Act, to attack the legality of a loan by the Rural Electrification Administration to a rural electric cooperative for the construction of an electric transmission line, where the private company claims that the resulting competition will cause it economic loss.

STATUTES INVOLVED

Section 4 of the Rural Electrification Act of 1936, as amended (49 Stat. 1365, 58 Stat. 739–40, 925, 63 Stat. 948, 7 U. S. C. 904), reads in pertinent part as follows:

> The Administrator is authorized and empowered * * * to make loans for rural electrification to * * * cooperative, nonprofit, or limited-dividend associations * * * for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, * * *.

Section 10 (a) of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009 (a)), reads in pertinent part as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) * * * Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the

meaning of any relevant statute, shall be entitled to judicial review thereof.

STATEMENT

This case was instituted by the filing of a complaint by petitioner Iowa-Illinois Gas and Electric Company in the district court on August 31, 1956. The complaint sought (1) a declaratory judgment that a certain loan of money by Rural Electrification Administration to a cooperative for the construction of a transmission line to enable the cooperative to serve a customer theretofore supplied by petitioner was illegal, (2) a permanent injunction against respondents from carrying out the provisions of the loan agreement, and (3) a preliminary injunction pending final hearing and determination (R. 2–9). Petitioner's complaint was founded principally on the theory that, since the customer involved was receiving central station service from petitioner, there was no authority under Section 4 of the Rural Electrification Act (*supra*, p. 2) to make a loan to a cooperative to enable it to supply the power requirements on an addition which was being constructed to the facilities of the customer. In denying the preliminary injunction on the ground that Iowa-Illinois lacked standing to attack the loan, the district court was "unable in principle to distinguish the case at bar from *Kansas City Power and Light Co.* v. *McKay*, 96 U. S. App. D. C. 273," 225 F. 2d 924, certiorari denied, 350 U. S. 884 (R. 29).[1]

[1] The district court also denied Iowa-Illinois' application for a stay pending appeal. Since Iowa-Illinois did not renew its application for a stay in the Court of Appeals, the construction of the transmission line went forward. We are advised that

On appeal, the court below also affirmed on the authority of the *Kansas City* case and remanded with directions to dismiss the complaint (Pet. App. 1a–2a, 3a).

ARGUMENT

In *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, a number of private electric utility companies sought to attack the legality of loans made by the Rural Electrification Administration to electric cooperatives. The Court of Appeals for the District of Columbia Circuit there ruled that, since the loans, even if illegal, resulted solely in economic injury resulting from competition, the companies were without standing to contest the loans. In so concluding, the Court of Appeals relied, *inter alia*, upon *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118; and *Duke Power Co.* v. *Greenwood County*, 302 U. S. 485,[2] where, in the absence of a special statutory right, this Court had similarly denied standing to electric utility companies to attack Government-financed competition. In addition, the court held that the requisite standing was not conferred upon the companies either

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the construction has long since been completed, the line is now in operation and all but 10% of the loan has been advanced.

[2] In the *Duke Power Co.* case, this Court said (p. 490):

"Upon the question of petitioners' standing to maintain the suit, the lower court held, in substance, that the competition proposed by the county was lawful and that even though the administrator were without authority to make the proposed loan and grant, no legal right of petitioners was thereby invaded. The opinion * * * is in harmony with [*Alabama Power Co.* v. *Ickes*, 302 U. S. 464]; and it follows that the decree must be, and it is, Affirmed."

by the Rural Electrification Act or by Section 10 (a) of the Administrative Procedure Act. The companies sought review in this Court of this denial of standing (see Petition in No. 370, Oct. Term, 1955). The Court denied certiorari, 350 U. S. 884.

The critical facts in *Kansas City* are substantially identical to those in the present case[3] and both the lower courts, being of the view that the instant case is indistinguishable from *Kansas City*, held on the authority of that case that Iowa-Illinois similarly has no standing to attack the loan here. The same reasons militating against further review in *Kansas City* (see Brief in Opposition in No. 370, Oct. Term, 1955, particularly pp. 15–21) are fully applicable here.

1. Contrary to petitioner's implication (see Pet. 8–9; compare Petition in No. 370, Oct. Term, 1955, pp. 27–28), electric companies were not the intended beneficiaries of the Rural Electrification Act which was enacted to bring electric power and energy to persons in rural areas not receiving central station service. See *Kansas City* case, 225 F. 2d at 931, fn. 11.[4] Moreover, the Act does not in terms confer

[3] Although on the merits *Kansas City* involved a complicated factual situation, the facts pertinent to the standing issue were not, as petitioner contends (Pet. 11–12), substantially more complicated than those of this case.

[4] Petitioner suggests that, since it was engaged in service to ultimate consumers, it has a direct interest in the central station provision of the Rural Electrification Act, unlike the petitioners in *Kansas City*, which were generally engaged primarily in generation and transmission of electricity at wholesale (Pet. 11). This contention ignores the fact that in both cases the es-

any rights upon the power companies, although they may qualify as recipients of REA loans. The Act does not regulate or impose restraints upon the manner in which Iowa-Illinois conducts its business. Nor does it contain any provision for holding hearings, issuing orders, permitting intervention, or judicial review; nor is there any reference to "persons aggrieved", "persons whose interests may be adversely affected", or any of the other terms or provisions regularly associated with statutes granting a statutory right to sue.

To the extent that the Rural Electrification Act sets out the circumstances in which loans may be made, it merely provides "guide posts" by which the Government's agents are to proceed. The provisions "create duties to the Government alone. * * * The Secretary's responsibility is to superior executive and legislative authority. Respondents have no standing in court to enforce that responsibility or to represent the public's interest in the Secretary's compliance with the Act." *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127, 129. Cf. *Starr* v. *Nashville Housing Authority*, No. 936, Oct. Term, 1956, motion to affirm granted, June 17, 1957.

Sole responsibility to superior executive and legislative authority in the present case is emphasized by

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sence of the complaints was the competition which the respective utility companies would suffer if the loan contracts were carried out and that, in both, the REA loans were to cooperatives operating at the same trade level as the utility companies seeking to attack the loans. The impact of the threatened competition upon the respective utility companies was, therefore, for all practical purposes, the same.

the fact that the administrative programs have been under virtually continuous congressional review because they entail the expenditure of large sums of public funds requiring annual appropriations by Congress. As the court below pointed out in *Kansas City* (225 F. 2d at 931), "The continuance of defendants' activities here complained of is therefore subject to review by Congress acting each year on the appropriations sought by the defendants."

2. Nor does Section 10 (a) of the Administrative Procedure Act create standing in Iowa-Illinois. Contrary to petitioner's assertions (Pet. 8–10; compare Petition in No. 370, Oct. Term, 1955, pp. 18–19), the court in *Kansas City* did not hold that the Administrative Procedure Act did not increase the availability of judicial review of agency action, or that the right of judicial review depends upon the express grant of such a right, or that the Administrative Procedure Act was to be narrowly construed. The court specifically stated a contrary view,[*] but held that in the circumstances there was "no basis for recognizing plaintiffs' standing to bring this action under the judicial review provisions of the Administrative Procedure Act" (225 F. 2d at 933).

As we have already seen (*supra*, pp. 5–7), the executive action here in question does not involve any

[*] Expressly mindful of the statements by this Court of the statute's remedial purposes in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 41, and *Heikkila* v. *Barber*, 345 U. S. 229, relied on by petitioner (Pet. 6–7), the court stated that "we would certainly be prepared to hold in an appropriate case that one who complains of administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption" (225 F. 2d at 933).

regulation of petitioner, the imposition of obligation or sanctions, the denial of any rights of relief, or the determination of any status. Accordingly, since it was not a statutory beneficiary nor is it subject to any administrative action either affirmative or negative under the Rural Electrification Act, Iowa-Illinois was not "adversely affected or aggrieved * * * within the meaning of any relevant statute" even as it would construe that language (see Pet. 8-9).

Petitioner's position is even weaker when it is recognized that the phrase "adversely affected or aggrieved * * * within the meaning of any relevant statute" obviously relates, in accordance with the existing law, to those situations where a right to seek judicial review is accorded by statute to persons who have had their interests, economic or otherwise, adversely affected by actions of a Government agency although they have had no legal right violated. See, *e. g.*, Section 9 of the Securities Act, 15 U. S. C. 77i; Section 402 (b) (6) of the Communications Act, 47 U. S. C. 402 (b) (6); Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b); Section 1006 of the Civil Aeronautics Act, 49 U. S. C. 646; *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470; *Associated Industries* v. *Ickes*, 134 F. 2d 694, 700-701 (C. A. 2). Here, no legal right of Iowa-Illinois has been violated, and as already indicated (*supra*, pp. 5-7), the Rural Electrification Act was not intended to bestow rights upon private utility companies.

In addition, the legislative history of the Administration Procedure Act reveals that Section 10 (a) was

intended primarily to adopt well-established principles as to standing. In explaining the bill on the Senate floor, Senator McCarran, the Chairman of the Judiciary Committee read with approval the Attorney General's comments on Section 10 (a):

> Section 10 (a): Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review of such action. This reflects existing law. In *Alabama Power Co.* v. *Ickes* (302 U. S. 464), the Supreme Court stated the rule concerning persons entitled to judicial review. Other cases having an important bearing on this subject are: *Massachusetts* v. *Mellon* (262 U. S. 447), *The Chicago Junction Case* (264 U. S. 258), *Sprunt & Son* v. *United States* (281 U. S 249), and *Perkins* v. *Lukens Steel Co.* (310 U. S. 113). An important decision interpreting the meaning of the terms "aggrieved" and "adversely affected" is *Federal Communications Commission* v. *Sanders Bros. Radio Station* (309 U. S. 470). [S. Doc. No. 248, 79th Cong., 2d Sess., Administrative Procedure Act, Legislative History, p. 310.]

Nowhere in the legislative history is this clear statement contradicted.

Petitioner fails to appreciate that the judicial review provisions of the Administrative Procedure Act do not prescribe a rigid rule on standing but rather have left the determination in a specific case to be "marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts'

judgment as to the probable legislative intent derived from the spirit of the statutory scheme." Final Report of the Attorney General's Committee on Administrative Procedure (1941), p. 92. This is the essence of the ruling by the Court of Appeals, and indeed, the only workable interpretation of Section 10 (a).

3. One additional matter remains for consideration. In *Grace Line, Inc., et al. v. Panama Canal Company*, C. A. 2, No. 111, October Term, 1956 (decided April 8, 1957), the Court of Appeals for the Second Circuit held, without pertinent elaboration or discussion, that "Section 10 (a) of the Administrative Procedure Act * * * confers standing on persons * * * adversely affected or aggrieved * * * within the meaning of any relevant statute'" (slip opinion, p. 1093), and in so holding pointed to, as the there "relevant statute," the Panama Canal Act of 1912, as amended, a statute dealing with the non-regulatory management of public property and conferring no rights upon the users of this property.

Although the general approach of the Court of Appeals for the Second Circuit to the question of standing in the *Grace Line* case appears to be inconsistent with that taken in the instant case, we nevertheless do not believe that certiorari should be granted here. As already indicated, the *Kansas City* holding, to which both courts below adhered, is clearly correct and in accord with the controlling precedents. Moreover, although the standing issue will be raised in the petition for a writ of certiorari which will be filed by the Panama Canal Company in *Grace Line*, this

Court may, in light of the many issues peculiar to that case which the Government will urge were decided contrary to controlling precedents, see fit to dispose of *Grace Line* without reaching the standing issue. And, finally, the factual situation in *Grace Line* is, of course, quite different from that involved in this case and in *Kansas City*.

CONCLUSION

The decision below is clearly correct and the petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 144

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY,
PETITIONER

v.

EZRA TAFT BENSON, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENTS SUGGESTING THAT THE CASE IS MOOT

The Solicitor General, on behalf of the respondents herein, respectfully suggests to the Court that the above-entitled case has become moot.

Petitioner electric utility company (R. 3) sought a declaratory judgment and injunctive relief against respondents, the Secretary of Agriculture, and the Administrator and Deputy Administrator of the Rural Electrification Administration (R. E. A.), to prevent them from performing a loan agreement which petitioners alleged to be illegal. The agreement provided that the R. E. A. was to loan the

Central Iowa Power Cooperative certain sums of money, including approximately $120,000.00 to construct a transmission line for the use of the Greene County Rural Electric Cooperative (R. 4-5). This transmission line was intended to supply the electric power requirements of a manufacturing plant in Lehigh, Iowa (R. 5). Petitioner alleged that it would be irreparably injured if this loan agreement was carried out because it is already furnishing central station electric power service to Lehigh. The effect of construction of the new transmission line would be to deprive it of customers.

The District Court for the District of Columbia denied a preliminary injunction upon the ground that petitioner lacked standing to attack the loan, relying upon *Kansas City Power and Light Company* v. *McKay,* 96 App. D. C. 273, 225 F. 2d 924, certiorari denied, 350 U. S. 884 (R. 29).

The Court of Appeals affirmed this ruling on the authority of its decision in *Kansas City,* and remanded with directions to dismiss the complaint.

On May 28, 1957, petitioner asked this Court to review the case upon a writ of certiorari. In opposing this petition respondents advised the Court that the District Court had denied a stay pending appeal, that construction of the transmission line to Lehigh had gone forward to completion, and that all but a small percent of the funds for its construction had been advanced by R. E. A. (Brief In Opposition for Respondent, p. 3 at fn. 1).

As is shown by the affidavit of the Administrator of the R. E. A. filed herewith (Appendix, pp. 5–6), the R. E. A. has now completed performance of all its obligations to advance funds under the loan agreement for the transmission line to Lehigh. Construction of the line has been completed and the contractor paid in full.

In these circumstances we respectfully suggest that the case has become moot. There is no longer any basis for declaratory or injunctive relief even if it be assumed that petitioner has standing to challenge the loan agreement. The purpose of its suit was to prevent the R. E. A. from advancing funds for the construction of a transmission line to Lehigh, Iowa. All funds for this purpose have been advanced and the line has been constructed and paid for. Further litigation cannot change these facts.

Accordingly, it is requested that, in accordance with its established practice and in light of the suggestion made here, this Court grant the petition for certiorari, vacate the judgments below, and remand with a direction to dismiss the proceedings upon the ground that the case is now moot. *United States* v. *Munsingwear*, 340 U. S. 36, 39–40; *Cozart* v. *Wilson*, 352 U. S. 884; *Brotherhood of Locomotive Firemen and Enginemen* v. *United States*, 343 U. S. 971; *Los Angeles Building & Construction Trades Council* v. *Le Baron*, 342 U. S. 802; *Eastern Air Lines* v. *Civil Aeronautics Board*, 341 U. S. 901; *Securities and Exchange Commission* v. *Harrison*, 340 U. S. 908; *Howard* v. *United States*,

340 U. S. 898; *Garcia* v. *Landon*, 348 U. S. 866; *United States* v. *Amarillo-Borger Express, Inc.*, 352 U. S. 1028.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

FEBRUARY 1958.

In The Supreme Court Of The United States

No. 144

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY,
PETITIONER

v.

EZRA TAFT BENSON, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE, ET AL., DEFENDANTS

AFFIDAVIT OF DAVID A. HAMIL

DISTRICT OF COLUMBIA, *ss:*

David A. Hamil, being first duly sworn, deposes and says as follows:

1. I am the Administrator of the Rural Electrification Administration (hereinafter referred to as "REA"), an agency of the United States Department of Agriculture. In this capacity I have personal knowledge of certain records and documents in the official files of the REA which disclose the matters described below.

2. On September 9, 1955, a loan agreement was entered into between the REA and the Central Iowa Power Cooperative. Under the terms of this agreement, the REA was to advance to the borrower certain sums of money, including approximately $120,000 to finance the construction of an electric power transmission line (known as the "Lehigh Tap") from a point west of Boone, Iowa, to Lehigh, Iowa. This line was to be used by the Greene County Rural Electric Cooperative to serve a customer in Lehigh.

3. All funds required under the loan agreement for the construction of the "Lehigh Tap" have been requisitioned by the Central Iowa Power Cooperative and advanced by the REA. Construction of the line has been completed, and the construction contractor paid in full. There is in REA files a receipt for final payment signed by the contractor on October 14, 1957. All obligations to advance funds for the "Lehigh Tap" under the loan agreement have been performed by the REA.

[s] David A. Hamil.
DAVID A. HAMIL.

Subscribed in my presence and sworn to before me this 30th day of January, 1958.

[SEAL] [s] BESSIE H. SCRIVENER,
Notary Public.

My commission expires February 28, 1958.